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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Marlin Johnson, Roy M. Mitchell, Robert Piper, and William O'Neal, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-169a)[1] is reported at 600 F.2d 600. A "Summary"

[1] "Pet. App." refers to the separately-bound appendix to this petition. "C.A. App." refers to the appendix to the brief filed in the court of appeals by respondents Anderson, Bell, Clark, Satchel, and Truelock. "Tr." refers to the trial transcript.

of the evidence at trial, prepared by the trial judge and submitted to counsel with an explanatory letter dated July 28, 1977 (Pet. App. 175a-221a), was treated by the court of appeals as the opinion of the district court (Pet. App. 11a n.4); it is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 233a-235a) was entered on April 23, 1979, and petitions for rehearing were denied on September 12, 1979 (Pet. App. 170a-171a). On December 3, 1979, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari until December 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, having determined only that directed verdicts should not have been entered in favor of petitioners and that the case should therefore be remanded for a new trial, the court of appeals erred in awarding attorneys' fees to respondents as "prevailing parties" under 42 U.S.C. 1988.

2. Whether the court of appeals' reversal of directed verdicts in favor of petitioners is inconsistent with the standard set forth in *Butz* v. *Economou*, 438 U.S. 478 (1978), for terminating constitutional tort actions in which federal officers' sworn denials that they engaged in non-immunized conduct are not squarely contradicted by other evidence in the record.

STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

1. In the early morning of December 4, 1969, police officers employed by or detailed to a "Special Prosecution Unit" in the State's Attorney's Office, Cook County, Illinois, entered a Chicago apartment occupied by nine members of the Black Panther Party (BPP) (Pet. App. 2a). The officers were acting pursuant to a warrant issued the previous day by the Cook County Circuit Court, authorizing them to search for and seize illegal weapons (*ibid.*). Shortly after the entry, gunfire erupted, killing Fred Hampton and Mark Clark, two of the apartment's occupants, and wounding four others (*id.* at 3a). The police seized 19 unregistered weapons, a stolen police gun, and a sawed-off shotgun (*id.* at 176a), and arrested the seven survivors on state criminal charges (*id.* at 31a).

This incident led to several state and federal investigations and legal proceedings. In January 1970, the seven survivors were indicted by a Cook County grand jury on charges of attempted murder and aggravated battery (Pet. App. 38a). A later examination of ballistics evidence by an FBI expert revealed, however, that, contrary to the findings made in December 1969 by a ballistics analyst employed by the Chicago Police Department, all but one of the identifiable bullets fired in the December 4 raid had been fired by police officers executing the warrant and none had been fired by any of the surviving occupants (*id.* at 40a-41a, 57a). The state indictments of the survivors were ultimately dismissed (*id.* at 43a). Meanwhile, in January 1970, a federal grand jury convened to inquire into possible civil rights violations began taking evidence (*id.* at 39a). The grand jury issued a report but returned no indictments prior to its discharge in May 1970 (*id.* at 39a-43a; see also *In re Johnson*, 484 F.2d 791 (7th Cir. 1973)). In June 1970, a special state prosecutor was appointed to investigate police and BPP actions on December 4. This investigation resulted in an indictment of some of the state defendants in the present action for conspiracy to obstruct justice. These defendants were acquitted after a bench trial in October 1972 (Pet. App. 43a).

2. In June 1970, respondents, the surviving occupants of the apartment and the legal representatives of Hampton and Clark (hereinafter referred to as "plaintiffs"), filed four civil damage actions (later

consolidated) in the United States District Court for the Northern District of Illinois against Cook County, the City of Chicago, certain of their officials and employees, and persons connected with the State's Attorney's Office, relating to the December 4 raid and its aftermath. After proceedings in the district court and the court of appeals resulted in dismissal of the complaint against some of the defendants (see *Hampton* v. *City of Chicago*, 339 F. Supp. 695 (N.D. Ill. 1972), aff'd in part and rev'd in part, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)), plaintiffs, in 1974, filed a second amended complaint naming as additional defendants three Chicago FBI agents (petitioners Johnson, Piper, and Mitchell) and an FBI informant (petitioner O'Neal) (hereinafter referred to jointly as "the federal defendants").[2]

Basing their claims on 42 U.S.C. 1983, 1985(3), and 1986, and on provisions of the Constitution, plaintiffs generally charged that the FBI agents intentionally or negligently deprived them of their civil rights by (i) conspiring with various state defendants to plan and carry out the December 4 search (Counts 1-4), (ii) failing to prevent false imprisonment of the surviving occupants (Count 7),

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[2] Petitioner Johnson was the Special Agent in Charge of the Chicago FBI office from 1962 to 1970. Petitioner Piper supervised the Racial Matters Squad in that office from March 1969 to June or July 1970. Petitioner Mitchell was assigned to the Racial Matters Squad from 1968 to the middle of 1970. Petitioner O'Neal reported to petitioner Mitchell.

(iii) conspiring to bring about plaintiffs' malicious prosecution on state criminal charges or failing to prevent it (Counts 8-10), and (iv) conspiring to obstruct justice by denying plaintiffs their Sixth Amendment right to counsel and impeding vindication of seven of them on the state charges (Count 11) (Pet. App. 7a-9a). Petitioner O'Neal was named in all the counts except seven through ten (*ibid.*). In addition, the federal defendants were charged under state law with the wrongful death of Hampton and Clark (Count 14) (*id.* at 9a).

Trial commenced on January 5, 1976. Plaintiffs introduced evidence relating to an FBI counterintelligence program known as COINTELPRO, having its origins in the 1950's, that consisted of covert actions directed at various domestic organizations, some violent, others not. In 1967 this program had been expanded to include certain militant black groups (Pet. App. 12a). Unlike the FBI's regular criminal investigation programs, in which exchanging law enforcement information with local agencies was an integral part of efforts to detect and prevent crime, COINTELPRO had an additional aim of disrupting and neutralizing the target organizations (*id.* at 12a-14a; see also *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book III at 3 (1976)). Plaintiffs sought to suggest that the federal defendants had invidious motives to harm the BPP and its membership and that any actions taken by the federal defendants with

respect to the BPP were part of the COINTEL program.

Plaintiffs also called the federal defendants as witnesses to testify to their actions relating to the Chicago chapter of the BPP and, in particular, to petitioner Mitchell's having furnished to the State's Attorney's Office, before December 4, information about a floorplan of the Hampton apartment and about weapons stored in the apartment. The federal defendants' testimony established that this information, which was originally supplied by petitioner O'Neal to petitioner Mitchell, was given by Mitchell to the State's Attorney's Office (Pet. App. 19a-20a). However, the federal defendants denied that they joined in planning the December 4 raid or that they even knew about it in advance (Tr. 5036, 5404, 8222-8223, 9499-9503, 23968-23972). Two state defendants who allegedly met with petitioner Mitchell prior to the raid corroborated this testimony, one denying having received any communications from the FBI about the BPP and the other stating that he had obtained information from Mitchell about the Hampton apartment but had not told Mitchell he planned to seek a search warrant (Tr. 24794, 24798, 24988, 25014). Plaintiffs also introduced other evidence, principally memoranda written or approved by some of the federal defendants. Plaintiffs asserted that this evidence permitted inferences contradicting the federal defendants' express denials.[3] Plaintiffs also

[3] The portions of this evidence described and relied on by the court of appeals in reversing the district court's grant

introduced evidence (described at pages 15-16, *infra*) relating to actions of the federal defendants in connection with an investigation of the December 4 raid.

At the close of plaintiffs' case, about 16 months after trial began, the district court granted the motions of the federal defendants and certain other defendants for a directed verdict (Pet. App. 186a, 222a-230a).[4] Final judgment directing dismissal of the complaint as to all defendants was entered two months later, on June 20, 1977, after the jury deadlocked regarding the seven remaining defendants, the police officers charged with firing their guns in the Hampton apartment on December 4 (Pet. App. 186a-187a, 231a-232a).

In its "Summary" of the evidence at trial, the district court noted that there had been "numerous incidents in Chicago of armed violence involving members of the Black Panther Party" (Pet. App. 188a-189a). It also observed that dissemination by the FBI of investigative information about possible criminal activity to local law enforcement agencies was required by established lawful FBI regulations and directives (*id.* at 190a-191a). The court further noted that the federal defendants and members of

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of directed verdicts in favor of the federal defendants are set forth below in our summary of the court of appeals' opinion (pages 10-16, *infra*).

[4] Although the district judge later referred to his order granting these motions as an "unentered Order" (Pet. App. 173a), the record filed in the court of appeals indicates that the order was in fact entered on April 15, 1977.

the State's Attorney's Office had denied under oath the existence of any conspiracy to conduct an unlawful raid and that this direct testimony was not contradicted by any other evidence offered by plaintiffs (*id.* at 189a-191a).

3a. The court of appeals, in a 2-1 decision, reversed the directed verdicts as to the federal defendants and most of the other defendants (Pet. App. 1a-169a). The court discerned two possible conspiracies in the evidence presented by the plaintiffs (*id.* at 47a). The first was described as involving "the pre-raid preparations and planning, and the raid itself" (*ibid.*). (The search itself was characterized by the court as having deprived the apartment occupants of their civil rights because it was allegedly carried out on the basis of an invalid search warrant and because the officers executing the warrant allegedly used excessive force and committed unwarranted assaults on the occupants (*id.* at 57a, 84a-85a, 119a-120a).) The second conspiracy was described as "the alleged cover up of evidence regarding the instigation, preparation, and execution of the raid, and the post-raid legal harassment of the plaintiffs" (*id.* at 47a). In the court of appeals' view, the proof adduced against the federal defendants on both theories was sufficient to go to the jury. In his opinion for the panel majority, Judge Swygert set forth at some length (*id.* at 12a-43a) the record evidence that provided the "basis for [the court's] determination of the legal issues concerning the directed verdicts" (*id.* at 44a).

The court of appeals relied on evidence of the operation of the FBI's COINTEL program to supply proof of "class-based animus" against the BPP on the part of the federal defendants (Pet. App. 51a-52a). The evidence cited concerned both the aims of the program relating to "Black Nationalist Hate Groups" and the actions taken either by the Chicago FBI office, supposedly as part of COINTELPRO, or by petitioner O'Neal, possibly acting on his own (*id.* at 12a-17a). The national program included such objectives as preventing those groups from joining with each other or from engaging in violence (*id.* at 13a). Some actions of the Chicago FBI office and of petitioner O'Neal were apparently aimed at creating dissension between the BPP and such groups as Chicago youth gangs and the Students for a Democratic Society, and, if plaintiffs' evidence were credited, O'Neal personally may have encouraged the Chicago BPP to engage in violent and criminal activity (*id.* at 15a).

The court of appeals linked to these activities the fact that petitioner O'Neal had provided information that allowed local authorities to arrest Hampton on an outstanding warrant before he was to appear on a local television show; that the Chicago FBI office had received authorization for a warrantless electronic surveillance of BPP headquarters; and that in June 1969 Chicago FBI agents, in executing a fugitive arrest warrant, had conducted a search of BPP headquarters that resulted in the seizure of weapons and the arrest of some Black Panthers on charges (later dropped) of harboring a fugitive (Pet. App. 15a-

16a). Finally, the court noted that FBI officers were urged to develop working relationships with local law enforcement agencies both to aid in "the FBI's counterintelligence goals" and to provide information to such agencies in compliance with the FBI's established law enforcement mandate apart from COINTELPRO (*id.* at 16a).

The court of appeals referred to a series of actions between November 13 and December 4, 1969, in its discussion of the federal defendants' alleged participation in the conspiracy concerning the raid. Petitioner Mitchell showed petitioner O'Neal photographs of two Chicago policemen killed in a shootout on November 13, 1969, with a man connected with the BPP (Pet. App. 17a). On November 19, petitioner Mitchell, with petitioner O'Neal's aid, constructed a floorplan of the Hampton apartment that included information about who frequented the apartment and which bedroom was used by Hampton (*id.* at 17a-18a). At about this time, petitioner O'Neal gave petitioner Mitchell information concerning weapons in the apartment (*id.* at 18a). Petitioner Mitchell prepared a memorandum dated November 21, listing weapons in the apartment, but the list did not include a sawed-off shotgun and a stolen police gun, possession of which might have violated federal law (*ibid.*).[5] Petitioner Mitchell did not notify the

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[5] Petitioner Mitchell testified at trial, without contradiction, that he had dictated the weapons memorandum on November 19, after an initial telephone conversation with petitioner

Alcohol, Tobacco, and Firearms Division of the Treasury Department about these two guns (*ibid.*).

After November 19, petitioner Mitchell gave the floorplan and weapons information to both the State's Attorney's Office and the Gang Intelligence Unit (GIU) of the Chicago Police Department (Pet. App. 18a-20a). Petitioners Piper and Johnson also were aware that information was being given to the GIU (*id.* at 18a-19a). Shortly thereafter, petitioner O'Neal told petitioner Mitchell that the weapons had been moved out of the apartment in anticipation of a police raid (*id.* at 19a). When this information reached petitioner Johnson, he directed that it be relayed to all previously-notified local law enforcement agencies. He and Mitchell then called the GIU (*ibid.*). The GIU director confirmed that a raid had been planned, but told petitioner Johnson that it would be cancelled (*ibid.*). Between late November and December 4, petitioner Mitchell had between five and seven conversations with Richard Jalovec, Assistant State's Attorney in charge of the Special Prosecution Unit (*id.* at 19a n.12). On or about November 26, petitioner Mitchell told Jalovec that the weapons had been returned to the apartment, that some had been

O'Neal, and that it was in a second meeting with O'Neal later that day that he learned about the shotgun and the stolen police gun (Tr. 6824-6825, 6827-6831). Petitioner Mitchell testified further that he had asked petitioner O'Neal about the serial numbers on the guns, but O'Neal did not have this information or information about the barrel length of the shotgun (Tr. 6825) and that when Mitchell again asked O'Neal in late November about the serial numbers, O'Neal could not supply them (Tr. 7019-7020). This testimony was not referred to by the court of appeals.

illegally purchased, and that BPP members besides Hampton and his girlfriend Deborah Johnson frequented the apartment (*id.* at 19a).[6] On or about December 1, petitioner Mitchell told Jalovec that it appeared that the returned weapons included the sawed-off shotgun and the stolen police gun. Shortly thereafter, petitioner Mitchell met with Jalovec and Sgt. Daniel Groth, a police officer attached to the State's Attorney's Office, showed them the apartment floorplan, and told them that the BPP was expected to hold a political education meeting at a place other than the apartment on the evening of December 3 (*id.* at 19a-20a). Petitioner Piper had approved this exchange of information (*id.* at 20a).

Groth told Jalovec on December 3 that he had received information from another source similar to that supplied by petitioner Mitchell (Pet. App. 20a). Later that day Jalovec and Groth drafted a search warrant supported by an affidavit stating that each had received information from an unnamed reliable source that the Hampton apartment contained numerous weapons, including sawed-off shotguns (*id.* at 21a). Based on the affidavit, a Cook County Circuit Court judge issued a search warrant, which was executed at approximately 4:30 a.m. on December 4 by officers attached to the State's Attorney's Office (*id.* at 21a, 23a). Meanwhile, on December 3, 1969,

[6] Petitioner Piper testified without contradiction that he informed the GIU around this time that the weapons had been moved back to the apartment (Tr. 9362; see also C.A. App. D-24). This testimony was not referred to by the court of appeals.

petitioners Johnson and Piper approved a counter-intelligence memorandum stating that information about weapons in the Hampton apartment had been furnished to local law enforcement agencies and that the Chicago Police Department planned "a positive course of action" (*id.* at 22a; C.A. App. D-20 to D-21).

Petitioners Mitchell, Piper, and Johnson testified that they first learned of the raid on December 4 through the news media (Pet. App. 33a). Petitioner Mitchell, at petitioner Piper's direction, spoke with Jalovec and Groth to get the details, and Jalovec asked Mitchell if he would be concerned if it were generally known that Mitchell was the source of preliminary information used for the raid (*id.* at 33a-34a). Petitioner Johnson informed FBI headquarters that day about the raid (*id.* at 34a). Petitioner O'Neal continued to give the FBI information about the BPP (*ibid.*). On December 11, petitioner Piper wrote to FBI headquarters requesting a bonus for petitioner O'Neal because O'Neal had supplied information used for the raid that had not been available from other sources (*ibid.*; C.A. App. D-23), and on December 12, petitioner Mitchell wrote a memorandum for O'Neal's file stating that on December 1 or 2, the State's Attorney's Office had been informed that weapons, including "one sawed-off shotgun, exact length unknown, and a stolen riot police shotgun" were in the Hampton apartment (Pet. App. 34a; C.A. App. D-24).

After the federal grand jury had been convened (see page 4, *supra*), petitioner Johnson, as head of the Chicago FBI office, instructed the FBI case agent assigned to the grand jury to channel requests for evidence through him (Pet. App. 38a-39a). The case agent advised FBI headquarters that petitioner Johnson would testify before the grand jury, but not as to the circumstances of the December 4 raid, and that there would be no "exposure" for the FBI (*id.* at 39a). On February 11, 1970, petitioner Johnson, without prior consultation with petitioners Piper or Mitchell, did testify, stating that the Chicago FBI office had been unaware of the presence of *illegal* weapons in the apartment before the search. Petitioner Johnson was not asked about and did not mention any floorplan information supplied by petitioner Mitchell to Jalovec (*ibid.*). On the day that petitioner Johnson testified, petitioner Mitchell wrote FBI headquarters requesting authorization for continued payments to petitioner O'Neal as an informant, citing his having provided a floorplan and other information that might have saved those who executed the warrant on December 4 from " 'injury and possible death' " (*id.* at 39a-40a).

Petitioners Mitchell, Piper, and O'Neal did not testify before the grand jury, but the Racial Matters Squad, under Piper's supervision, supplied the grand jury case agent with information about the BPP. The case agent, however, was not given the floorplan or petitioner Mitchell's December 12 memorandum (Pet. App. 40a). An FBI expert, however, provided

the grand jury with an analysis indicating that the ballistics report used to support the state criminal charges against the surviving occupants of the apartment was in error (*id.* at 40a-41a). Jerris Leonard, the Justice Department official conducting the grand jury investigation, sought the testimony of both the "raiders" and the surviving occupants. He offered to give copies of the "raiders' " grand jury testimony to Edward Hanrahan, the Cook County State's Attorney, if Hanrahan would dismiss the state criminal charges against the BPP members; Leonard hoped that the latter would then agree to testify (*id.* at 41a-42a). Petitioner Johnson informed the case agent of this arrangement, and the agent sent the information to FBI headquarters, stating that federal indictments of police officers were not planned, that Hanrahan would receive the police officers' grand jury testimony, and that Hanrahan was planning to dismiss the state indictment because of the change in the ballistics evidence (*id.* at 42a & n.18). Plaintiffs refused to testify before the grand jury (*id.* at 43a).

b. The evidence summarized above represents the entire proof at trial relevant to the federal defendants that was relied on by the court of appeals in reaching its decision. The court of appeals held that this evidence was sufficient to permit submission of the conspiracy claims against the federal defendants to a jury. It acknowledged, however, that, with respect to the alleged raid conspiracy, the federal defendants could not be found to have violated plaintiffs' civil rights if they merely agreed to help the state defendants "enforce the law and prevent violence by the BPP" (Pet. App. 54a n.24). Similarly, Chief Judge Fairchild, whose vote was necessary for the court's judgment, noted in his concurring opinion that the lawfulness of the raid—and plaintiffs' entitlement to damages based upon it—turned solely upon the validity of the search warrant and the use of excessive force in executing it (*id.* at 119a-120a) and that a conspiracy "to discredit and hamper [the] BPP in its political activity" would not necessarily include within it a conspiracy to procure an invalid warrant or to execute the warrant using excessive force (*id.* at 120a). As to the federal defendants' liability arising from the raid, Chief Judge Fairchild observed (*ibid.*):

> The activity of the federal defendants in surveillance of a group from whom violent, unlawful conduct was expected, and in informing state officers of the floor plan and possession of weapons could be found to have been legitimate activity and cooperation in law enforcement, and not wrongful acts pursuant to a conspiracy, even though the jury also found a conspiracy to disrupt or discredit BPP politically. In my view, there could be no recovery of damages, arising from the raid, based solely on a conspiracy theory, unless the jury was satisfied that the unlawful raid or the use of excessive force in carrying out a lawful raid was within the objects of the conspiracy.

Regarding the basis for liability on the counts alleging that plaintiffs were damaged by a post-raid conspiracy, the court noted that petitioner Mitchell

had talked with Groth and Jalovec on the morning of December 4 and had left just before Hanrahan held a press conference about the raid (Pet. App. 63a), that the jury could find that certain of the federal defendants had acted to conceal evidence of their roles "in the planning of the raid," and that petitioner Johnson had been involved in the arrangement between Hanrahan and Leonard whereby the state criminal indictments were dismissed (*id.* at 63a-65a).

Finally, the court of appeals awarded plaintiffs their costs on appeal, including attorneys' fees, ostensibly under the authority of 42 U.S.C. 1988 (Pet. App. 104a-106a, 118a). These fees, which (as noted below; see page 21, note 10, *infra*) may exceed $1 million, are to be paid by "all nonprevailing defendants" (*id.* at 118a), including the federal defendants.[7]

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[7] The court also held that plaintiffs had been unduly hampered in presenting their case by the district court's tolerance of delays by the federal defendants in furnishing documents in response to plaintiffs' discovery requests. Judge Swygert would have directed the imposition of sanctions pursuant to Fed. R. Civ. P. 37(b)(2) against the federal defendants and their counsel (Pet. App. 101a). This direction was not included in the court's judgment, however, because Chief Judge Fairchild, in his concurrence, agreed only to recommend that the district court, on remand, consider imposing sanctions (*id.* at 121a). Judge Pell, although not agreeing that the federal defendants and their counsel had disobeyed discovery orders, joined Chief Judge Fairchild's view that the district court might consider sanctions on remand (*id.* at 138a-140a).

Judge Pell concurred in the court's opinion insofar as it affirmed portions of the district court's judgment (Pet. App. 138a).[8] He dissented as to the reversal of the directed verdicts except those respecting the use of excessive force by "the shooting officers" (*id.* at 152a, 153a). As to the federal defendants and the remaining state and city defendants, Judge Pell found no "basis for reasonable inferences that there was any kind of an agreement among them, express or implicit, to cause a raid to be made with the object of killing or wounding various Black Panther Party members" (*id.* at 152a), and he similarly found no basis for malicious prosecution charges against the federal defendants (*id.* at 156a). Moreover, in regard to the allegations that various defendants had obstructed post-raid investigations, Judge Pell found no harm to the plaintiffs and hence no basis for recovering damages (*id.* at 157a). Finally, with respect to attorneys' fees, Judge Pell agreed with the majority that fees might be allowed for appellate work, but because of his views on the merits, he would have awarded fees only "commensurate with the work involving the shooter defendants" (*id.* at 167a-168a).

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[8] The majority affirmed in whole or in part directed verdicts in favor of certain Chicago Police Department employees who had participated in post-raid police investigations (Pet. App. 118a).

On September 12, 1979, the court of appeals denied petitions for rehearing en banc by an equally divided vote (Pet. App. 170a-171a).[9]

REASONS FOR GRANTING THE PETITION

One of the principal functions of the Federal Bureau of Investigation involves the exchange of lawfully-acquired information about actual or proposed criminal activities with local law enforcement authorities. As plaintiffs' evidence at trial showed, that is all that occurred between the FBI and the State's Attorney's Office and the Chicago Police Department prior to and after the December 4 raid. In reversing the grant of directed verdicts for the federal defendants, the court of appeals' opinion threatens to discourage federal-state cooperation in law enforcement and disregards the clear direction in *Butz* v. *Economou*, 438 U.S. 478 (1978), that trial judges should be vigilant in disposing summarily of insubstantial damage claims against federal officials. Moreover, the court's ruling that plaintiffs are entitled at present to attorneys' fees as "prevailing parties" conflicts with the holdings of several other circuits. These are important issues that warrant this Court's review.

1. The court of appeals held that plaintiffs are "prevailing parties" within the meaning of 42 U.S.C.

[9] Chief Judge Fairchild and Judges Swygert and Cummings voted against rehearing. Judges Sprecher, Pell and Tone voted for rehearing on all issues "except as to the shooting policemen" (Pet. App. 170a). Judges Wood and Bauer disqualified themselves.

1988 and that they therefore are entitled to recover their attorneys' fees on appeal. Fee claims totalling approximately $1 million have already been filed in the court of appeals.[10] But plaintiffs have not yet prevailed on *any* aspect of their complaint. The court of appeals' judgment requires only that the case be remanded for a new trial. Should that remand be upheld and a new trial take place, plaintiffs may well lose. We submit that this reading of Section 1988 finds no support in the legislative history of the statute, conflicts with the decisions of other courts of appeals, and leads to substantial inequities by requiring defendants to finance what may be wholly baseless lawsuits against themselves.[11]

In the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (hereinafter "the Fees Act"), Congress amended 42 U.S.C.

[10] See "Application of James D. Montgomery for Assessment of Attorneys' Fees and Costs," filed May 29, 1979; "Petition for Approval of Bill of Attorneys' Fees and Costs" (with affidavits by five of plaintiffs' counsel), filed May 29, 1979; "Motion for Leave to File Supplementary Affidavits of Counsel for Attorneys Fees and Supplementary Bill of Costs" (with supplementary affidavits from three of plaintiffs' counsel), filed July 26, 1979; and "Supplementary Application of James D. Montgomery for Assessment of Attorney's Fees and Costs," filed August 1, 1979.

[11] The court of appeals' decision may also persuade litigants against seeking the dismissal of complaints or the entry of directed verdicts in close cases, for fear that a reversal on appeal would be accompanied by a large award of attorneys' fees. This result obviously would be contrary to the strong judicial and societal interest in expediting litigation.

1988 to permit a court to award a "prevailing party, other than the United States," a "reasonable attorney's fee" as part of its costs in "an action or proceeding [brought] to enforce" certain civil rights statutes, including 42 U.S.C. 1983, 1985, and 1986, the provisions involved here. Hence, in the present case, the court of appeals was authorized to award plaintiffs the attorneys' fees attributable to their appeal only if, by virtue of securing a partial reversal of the judgment granting directed verdicts and a remand for a new trial, plaintiffs had "prevailed" within the meaning of the Fees Act. The language and legislative history of 42 U.S.C. 1988 indicate, however, that plaintiffs are not "prevailing" parties entitled to an award of attorneys' fees in the posture of this case.

Plaintiffs have not "prevailed" in any substantial or meaningful sense. They have succeeded thus far only in obtaining a trial—a right they had at the time they filed their complaint. They have no more "prevailed" than has a plaintiff who successfully defeats a defendant's motion for a directed verdict. In either event, the case is merely allowed to go to the jury, which may reject all the allegations of the complaint.

To be sure, the pertinent House and Senate reports emphasize that the Fees Act was intended to permit the award of interim counsel fees *pendente lite* in some circumstances. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7-8 (1976). Both reports, however, illustrate appropriate interim awards by reference to two cases—*Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)—in which the parties to whom fees were awarded had established their claims on the merits, although a final order granting relief had not yet been entered. S. Rep. No. 94-1011, *supra*, at 5; H.R. Rep. No. 94-1558, *supra*, at 8.[12] Moreover, the Senate Report, in describing "especially appropriate" cases for interim awards, referred to cases "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues" (S. Rep. No. 94-1011, *supra*, at 5) (emphasis added). Similarly, the House Report explained that an appropriate guideline for determining when to make an interim fee award in protracted litigation is the Court's statement in *Bradley* that the "entry of any order *that determines substantial rights of the parties* may be an appropriate occasion upon which to consider the propriety of an award of counsel fees * * *" (H.R. Rep. No. 94-1558, *supra*, at 8, quoting *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 723 n.28 (emphasis added)).

These clear indications that Congress intended interim awards of attorneys' fees under the Fees Act

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[12] Indeed, in *Bradley*, the plaintiffs had succeeded in having the defendant school board enjoined to disestablish its segregated school systems well before the time at which the Court indicated they could be considered "prevailing parties," *i.e.*, the date on which a plan for desegregating the schools was approved. 416 U.S. at 723-724.

to be limited to parties that have prevailed on the merits as to at least part of their claims are reinforced by the fact that the Fees Act was expressly patterned on the attorneys' fee provisions of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k), and Section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973*l*(e). S. Rep. No. 94-1011, *supra*, at 2; H.R. Rep. No. 94-1558, *supra*, at 5. Prior to passage of the Fees Act, interim attorneys' fee awards under the Voting Rights Act had been made to plaintiffs who had succeeded at least in invalidating an unconstitutional electoral scheme, although a final constitutional plan had not been adopted. See, *e.g.*, *Ferguson* v. *Winn Parish Police Jury*, 528 F.2d 592, 599 (5th Cir. 1976); *Panior* v. *Iberville Parish School Board*, 498 F.2d 1232, 1237 (5th Cir. 1974). As to the Civil Rights Act of 1964, some interim attorneys' fee awards had been made to plaintiffs who had not proved discrimination, but, as the District of Columbia Circuit explained in an opinion devoted exclusively to the question of when a party may be said to have prevailed, those awards had been made without discussion. *Grubbs* v. *Butz*, 548 F.2d 973, 974 n.5 (D.C. Cir. 1976) (collecting cases). In *Grubbs*, decided three months before the Fees Act was passed, the court concluded that the plaintiff was not entitled to an attorneys' fee award under 42 U.S.C. 2000e-5(k) because she had prevailed only in establishing, on an interlocutory appeal, that the district court had erred

in dismissing her discrimination suit for failure to exhaust administrative remedies. As the court explained (548 F.2d at 976) (footnotes omitted):

> Since Congress was solicitous enough of the rights of innocent Title VII defendants to authorize awards of attorneys' fees in their favor, we cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination. For all we now know, the defendants in this case may be entirely blameless. If attorneys' fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. While that prospect might be consonant with the goals of a statute authorizing fee awards to any party, we find it contrary to the purposes of one that provides for awards only to the party who prevails.

Other circuits considering interim attorneys' fee awards under the Fees Act or the statutory provisions on which it was modelled have reached the same conclusion. See, *e.g.*, *Bly* v. *McLeod*, 605 F. 2d 134, 137 (4th Cir. 1979); *Whiteside* v. *Gill*, 580 F. 2d 134, 139-140 (5th Cir. 1978); *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); *Sperling* v. *United States*, 515 F. 2d 465, 485 (3d Cir. 1975), cert. denied, 426 U.S. 919 (1976). In each of these decisions, the court of appeals, contrary to the Seventh Circuit in this case, refused to allow an award of attorneys' fees to a plaintiff who had

prevailed on an aspect of the case unrelated to a final determination of the merits. See also *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) ("[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law."); *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861, 871 (8th Cir. 1977) (denying claim under Fees Act by plaintiffs who obtained preliminary injunction and successfully defended it on appeal).[13]

In the present case, therefore, where no court has ever determined that petitioners violated plaintiffs' legal rights,[14] the court of appeals erred in awarding

[13] In both cases cited by the court below to justify the award (Pet. App. 105a), those to whom fees were awarded had prevailed on the merits of a claim. Thus, in *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978), fees for appellate work were awarded to plaintiffs who had won in the trial court and on appeal; and in *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977), the court of appeals held that the plaintiff-appellant had established racial discrimination "both as a matter of fact and law." 562 F.2d at 556.

[14] In his opinion for the court, Judge Swygert stated that, in reversing the directed verdicts, the court was "not passing on the ultimate validity of plaintiffs' claims" (Pet. App. 46a n.20). Moreover, Chief Judge Fairchild made clear that Judge Swygert's use of the term " 'prima facie' case" in referring to the evidence developed by plaintiffs should not be taken to mean that at "any stage of [the] case * * * the evidence compelled a verdict for plaintiffs unless rebutted" (*id.* at 119a). Should a new trial be held and plaintiffs prevail, they may, of course, file claims for attorneys' fees that include the work on this appeal.

attorneys' fees against petitioners under 42 U.S.C. 1988, notwithstanding that the fees were limited to work on appeal.[15]

2. In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court held that the absolute immunity accorded a federal officer in *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959), from tort claims alleging discretionary acts within the "outer perimeter of [his] line of duty" does not apply to damage actions in which a federal officer is alleged to have knowingly violated the plaintiff's constitutional rights. In actions alleging constitutional torts, federal officers, like state officers sued under 42 U.S.C. 1983, are entitled to only a qualified immunity unless the "special functions" of the officer are such that absolute immunity is essential to the proper conduct of his office. 438 U.S.

[15] Construing 42 U.S.C. 1988 to prohibit an award of attorneys' fees to a party who has not yet established a claim on the merits would also avoid a possible constitutional problem. The fee award, if found to be authorized, is likely to impose a substantial financial burden on each individual defendant. It is at least questionable whether requiring substantial fee payments by defendants against whom no legal violation has been proven is consistent with due process. See *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 363 (1978) ("A bare allegation of wrongdoing, whether by breach of fiduciary duty or otherwise, is not a fair reason for requiring a defendant to undertake financial burdens and risks [payment of a substantial sum to aid in providing notice to the plaintiff class] to further a plaintiff's case."); *Berland* v. *Mack*, 48 F.R.D. 121, 131-132 (S.D.N.Y. 1969) (requiring defendant in class action to bear the financial burden of notice to the class on grounds that defendant was accused of breach of trust by class representative "smacks of confiscation").

at 508. Under qualified immunity, a federal officer may not be held liable for actions taken within the scope of his office that violate a plaintiff's constitutional rights if the officer held a reasonable good-faith belief that his actions did not violate the plaintiff's rights. 438 U.S. at 497-498, citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974).

At the same time, however, the Court was concerned that its decision in *Butz* not allow plaintiffs alleging constitutional violations to subject to harassing and protracted litigation federal officers guilty of nothing more than the vigorous exercise of the duties of their office. The Court expressly reminded the lower courts and counsel (438 U.S. at 507-508; footnote omitted):

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U.S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

The litigation in the present case was not terminated at the pretrial stage. Plaintiffs had full opportunity in 16 months of trial to demonstrate that the federal defendants, in their dealings with the state defendants, had engaged in conduct that exceeded the qualified immunity for good faith performance of their official duties.[16] At the end of plaintiffs' case the district court determined, after a painstaking review of the evidence, that the federal defendants' denials that they knew of or participated

[16] The court of appeals found that plaintiffs were denied a fair trial by what it characterized as delayed and obstructive responses by the federal defendants and their counsel to document subpoenas and discovery orders of the district court (Pet. App. 96a-100a). In fact, the documents were in the control of the FBI, rather than the individual defendants, and could be released only by its current employees under established procedures (see 28 C.F.R. 16.21 *et seq.*). Moreover, the district court, in denying plaintiffs' motion for the imposition of sanctions, stated that the federal defendants and their counsel "did at all times carry out the orders of the court to the best of their abilities" (Order of April 15, 1977, printed in the appendix to the brief of the federal defendants filed in the court of appeals, at F-150).

In any event, the prejudice to plaintiffs from the "obstructive" tactics of the federal defendants is far from apparent. Although the court of appeals pointed out that many volumes of the documents furnished by the federal defendants were not turned over until four to five months into the trial (Pet. App. 99a-100a), the court failed to note that this was nearly a year before plaintiffs closed their case. The court of appeals also mentioned (*id.* at 98a n.43) that in March 1977 the district court refused to allow plaintiffs to recall petitioners Johnson and Mitchell to re-examine them on the basis of documents turned over after they had left the stand. Yet when plaintiffs sought to recall these witnesses in March 1977, they did not suggest what specific subject they wished to inquire further about; rather, they simply voiced an unparticularized complaint that they were "being harmed" by the court's ruling (Tr. 28647).

in any plan "to violate plaintiffs' constitutional and statutory rights" either before, during, or after the events of December 4, 1969, "were uncontradicted and unimpeached by any testimony whatsoever" (Pet. App. 189a-190a).

The court of appeals agreed that if the federal defendants had done no more than what they said they did—that is, contributed to, engaged in, or approved the transmission of information about the BPP to local law enforcement agencies, including the State's Attorney's Office—they could not be held liable for the outcome of the raid, whatever its legality (Pet. App. 54a n.24, 119a-120a). The court of appeals reversed the district court's judgment, however, because of its determination that the evidence summarized in its opinion was sufficient to present a jury issue whether the federal defendants had, contrary to their denials, joined in a plan to raid the BPP apartment with an unlawful search warrant and by use of excessive force and, afterwards, to cause or knowingly acquiesce in a malicious prosecution of the survivors on baseless state criminal charges.

We submit that none of the evidence cited by the court of appeals contradicts the federal defendants' sworn denials. In view of the proof that exchanges of information between the FBI and local law enforcement agencies took place on a regular basis, it is not surprising that such exchanges would have occurred in the days immediately preceding the December 4 raid. And although various memoranda might raise

suspicions in some minds concerning the degree of connection between the federal and state defendants, suspicions and conjecture are no substitute for evidence and no basis on which to allow a jury to return a verdict imposing damages liability. As Judge Pell observed (Pet. App. 153a), plaintiffs simply failed to produce any "hard basic reasonable inference-creating facts." In short, had the federal defendants reduced their testimony to affidavits, and had the plaintiffs countered with nothing more than what they produced at trial, the defendants would have been entitled under *Butz* to entry of summary judgment. See *Maiorana* v. *MacDonald*, 596 F.2d 1072 (1st Cir. 1979) (affirming summary judgment in favor of state police officers alleged to have negligently or in bad faith used deadly force in arresting plaintiff's son, where facts creating inferences possibly supporting plaintiff's theory could also be reconciled with the officers' accounts of their actions). The district court was therefore correct in granting the federal defendants' motions for directed verdicts.

The court of appeals' reversal, based on its notion that a jury might not credit the federal defendants' denials of improper conduct, will subject several federal officers to what is likely to be a lengthy second trial. We believe that the court's action fails to take sufficient account of the policy that underlies the doctrine of official immunity and that impelled this Court in *Butz* v. *Economou*, *supra*, to stress its expectation that the lower courts would quickly dismiss insubstantial and unsupported complaints. The

decision of the court of appeals makes apparent the need for further guidance to the lower courts on the question whether plaintiffs may defeat a defense of qualified official immunity by relying on evidence that does not contradict a federal officer's sworn denials that he engaged in conduct exceeding the bounds of that immunity but that is merely susceptible to inferences inconsistent with those denials as well as to inferences consistent with them. Ultimately this is a question of how much weight is to be given the objective of assuring that federal officers will not be intimidated by the threat of protracted litigation from carrying out their lawful duties with thoroughness and vigor.[17] It is therefore a question of substantial public importance that warrants this Court's review.

[17] The court of appeals' decision is likely to give pause to other federal law enforcement officers charged with supplying reliable and lawfully-acquired information about criminal activities to local law enforcement agencies over which they exercise no control. As Judge Pell noted in dissent, the result of the decision below could well be "a potentially disastrous curtailment on necessary exchanges of information between law enforcement * * * agencies" (Pet. App. 153a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

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Attorneys

DECEMBER 1979

APR 25 PAGE 10

Supreme Court, U.S.
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APR 24 1980
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No. 79-914

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

In the reply memorandum filed on behalf of petitioners in this case (Mem. 4-5 n.6), we brought to the Court's attention a supplemental order issued by the court of appeals on December 12, 1979, in which it, *inter alia*, appeared to suggest that the United States, although not a party to the case, would be liable for attorneys' fees assessed in favor of the appellants and against the federal appellees (petitioners here). We also noted that the United States had petitioned for rehearing on that issue and that all of the appellees had petitioned for rehearing en banc on the question whether appellants could be considered "prevailing parties" within the meaning of 42 U.S.C. 1988.

On April 15, 1980, the court of appeals issued an order amending its order of December 12, 1979, to delete the language suggesting that the United States would be required to pay the attorneys' fees assessed against the

federal appellees and denying all petitions for rehearing en banc. The order of April 15, 1980, was accompanied by a concurring opinion of Judge Pell expressing the view that the appellants are not "prevailing parties" within the meaning of 42 U.S.C. 1988 and thus are not entitled to an award of interim attorneys' fees. Judge Pell "reluctantly conclude[d] that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question" (App., *infra*, 5a).

This order of the court of appeals, including Judge Pell's concurrence, is reproduced as an appendix to this memorandum.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

IBERIA HAMPTON, et al.,
Plaintiffs-Appellants,

Nos. 77-1698, et al. vs.

EDWARD HANRAHAN, et al.,
Defendants-Appellees.

On Petitions for Rehearing.

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorney fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

Pursuant to 42 U.S.C. § 1988, and citing as case authority *Davis v. Murphy*, 487 F. 2d 362 (7th Cir. 1978), the majority opinion in this case granted the request of the appellants for attorneys' fees for their appellate work. 600 F. 2d at 643. In my dissenting opinion, I implicitly agreed that the appellants were entitled to fees for their appellate work but would have only allowed the fees commensurate with the work involving the shooter defendants. 600 F. 2d at 666. My treatment of the matter of fees came at the end of a lengthy dissent and was included in a catchall section dealing with "Other contentions and issues." I now am of the belief that my position was incorrect and that the appellants are not "prevailing" parties within the meaning of section 1988. It is true that they have prevailed thus far in the sense of

keeping the litigation alive, but that is the only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated.

Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.

The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows.

> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal.

The second reference in the original brief appears at page 181 of the brief, a section devoted to the federal defendants, and reads as follows:

> And finally, costs for the trial and the appeal, and attorneys' fees* should be assessed against these Defendants.
>
> **Donahue v. Staunton*, 471 F. 2d 475 (7th Cir. 1972); *Stolberg v. Members of Board of Trustees*, 474 F. 2d 485 (1st Cir. 1973); Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976.

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the defendants. The issue, however, was addressed at some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have

a further opportunity of briefing a response. In their reply brief these plaintiffs while conceding that they "may not technically be 'prevailing parties'," contended that an award of attorneys' fees would be consistent with the policy, spirit, and congressional intent underlying section 1988. In addition, the appellants cited a number of cases as reflecting a growing body of precedent supporting the interim award of attorneys' fees.

The propriety of granting fees for appellate work in a situation such as the present where the claiming party had not yet prevailed on the merits was put in sharp focus by the federal defendants' petition for rehearing and suggestion for rehearing in banc in which this was one of only two issues raised. Specifically, these defendants contended that the cases on which the majority had relied were cases which disposed of the merits and that the principal case actually treating the issue, which was in the D.C. Circuit, had reached a contrary result. I agree with Judge Bazelon's analysis.

By an evenly divided vote, this court denied rehearing in banc which, as I see it, settled the issue insofar as this court was concerned, as the issue was squarely presented in the petition for rehearing. The petitions for rehearing presently pending before this court are in essence asking for reconsideration of an issue which has already been the subject of disposition. I do not read these petitions as essentially challenging the amount of the attorneys' fees but rather the propriety of any fees at all.

I am not unmindful that I joined in the order of this court of December 12, 1979, in which it was indicated that the court deemed that the plaintiffs had shown substantial success on the merits on appeal and that they were prevailing parties under section 1988. Upon further research and reflection, I am convinced that I was legally

incorrect in thinking that there was a basis for the award of any fees at this time.

Notwithstanding this "confession of error" on my part, I cannot be unmindful that procedurally this court by denying in banc rehearing has rejected the position which I now believe to be correct and I have no reason for believing that the three judges who voted against the rehearing in banc did not give full consideration to the propriety issue which was set forth in the petition for rehearing and is now being readvanced. The issue is one which has been raised by the defendants in their petitions for certiorari before the Supreme Court. I reluctantly conclude that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question.

I therefore concur in the foregoing order, albeit reluctantly.

79-914

No.

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 77-1698, 77-1210 and 77-1370

IBERIA HAMPTON ET AL., PLAINTIFFS-APPELLANTS

v.

EDWARD V. HANRAHAN ET AL.,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA EX REL.
HONORABLE JOSEPH SAM PERRY, APPELLEE

v.

JEFFREY H. HAAS, ATTORNEY AT LAW,
CONTEMNOR-APPELLANT

UNITED STATES OF AMERICA EX REL.
HONORABLE JOSEPH SAM PERRY, APPELLEE

v.

G. FLINT TAYLOR, ATTORNEY AT LAW,
CONTEMNOR-APPELLANT

Argued Aug. 14, 1978

Decided April 23, 1979

As Amended April 30, 1979

Before FAIRCHILD, Chief Judge, and SWYGERT and PELL, Circuit Judges.

SWYGERT, Circuit Judge.

This appeal concerns a civil rights action for monetary damages brought by members of the Black Panther Party and the mothers of two deceased party members against federal and state law enforcement officers. The suit arises from a gun battle which occurred in Chicago during the early morning hours of December 4, 1969. Two Black Panthers were killed and four other Panthers were injured by the gunfire. The action was tried in the district court before a jury in 1976-1977. At the close of plaintiffs' case, the district court directed verdicts for some of the defendants. The district court directed verdicts for the remaining defendants at the conclusion of the trial. We reverse as to most defendants and remand for a new trial.

I. BACKGROUND

At 4:30 a.m. on December 4, 1969, fourteen Chicago police officers, detailed to the Special Prosecutions Unit of the Cook County State's Attorney's Office, arrived at an apartment building located on the near west side of Chicago. They were equipped with a search warrant issued the previous day by a judge of the Cook County Circuit Court authorizing the search for and seizure of "sawed-off shotguns and other illegal weapons," at the first floor apartment, 2337 West Monroe Street. This apartment was occupied by nine members of the Black Panther Party ("BPP"). Seven officers took "cover" positions at the front and rear entrances of the apartment; seven entered the apartment. Immediately upon the police entry there was an enormous burst of gunfire. Two of the occupants, Fred Hampton and Mark Clark, died as a result of the gunfire and four others, Ronald Satchel, Blair Anderson, Brenda Harris, and Verlina Brewer, were wounded. Louis Truelock, Deborah Johnson, and Harold Bell escaped without physical injury.

Many reverberations followed the incident. Among these were the arrest and imprisonment of the surviving occupants of the apartment, their prosecution by the Cook County State's Attorney for criminal offenses, a coroner's inquest, and an internal investigation by the Chicago Police Department. A federal and two state grand jury investigations were initiated. Indictments were returned by the Special Cook County Grand Jury against several of the present defendants for conspiring to obstruct justice. The case terminated when defendants' motions for acquittal were granted at the close of the prosecution's case. Finally, this civil action was initiated.

The mothers of Hampton and Clark, as administratrices of their sons' estates, and the seven survivors of the December 4 incident filed four separate actions in 1970 against a number of city and state defendants. The actions were consolidated in an amended complaint filed in the district court in April 1972. [1]

[1] In June 1972 the death of Fred Howard, one of the police officers, was suggested on the record and the cause was dismissed as to him.

The defendants moved to dismiss the complaint. The district court denied the motions by the fourteen police officers participating in the raid. The court dismissed the complaint as to the remaining defendants.[2] Upon appeal this court affirmed in part and reversed in part. *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974), ("*Hampton I*").[3] Thereafter plaintiffs requested this court to supplement its mandate by directing that the case be reassigned to another judge for trial. We denied the request.

In December 1974 plaintiffs amended their complaint by naming four additional defendants, all connected with the federal government. In October 1975 plaintiffs moved to have the district judge recuse himself or to reassign the case. The motion was heard by another district judge and was denied.

---

[2] *Hampton* v. *City of Chicago*, 339 F.Supp. 695 (N.D.Ill. 1972).

[3] We summarized our action as follows:

> Insofar as the district court's order of February 3, 1972, dismissed the charges against the City of Chicago and the County of Cook, it is reversed with respect to the Brewer complaint and affirmed as modified with respect to the Johnson complaint; insofar as it dismissed the charges against Mayor Daley and Superintendent Conlisk, it is affirmed; insofar as it dismissed the charges against defendants Hanrahan, Jalovec, Mulchrone, Ervanian, Meade, Kukowinski, Purtell, Koludrovic, Sadunas, Sorosky and Meltreger, it is reversed. The case is remanded to the district court for further proceedings consistent with this opinion.

***Hampton I, supra*, 484 F.2d 602 at 611.**

The trial began January 5, 1976 and lasted approximately eighteen months. Thirty-seven thousand pages of testimony were taken. At the conclusion of plaintiffs' evidence, defendants moved for directed verdicts with costs. The motion was granted except for the seven police officers directly participating in the shooting incident, the court ruling that "no *prima facie* case of a conspiracy or joint venture has been established as alleged in the Amended Complaint . . . ." The trial continued as to the seven remaining defendants and at its conclusion the case was submitted to the jury. After three days deliberation the jury announced it was deadlocked. The trial judge then directed verdicts in favor of these defendants and assessed costs against plaintiffs for $100,000. This appeal followed.

During the trial, Jeffrey H. Haas and G. Flint Taylor, attorneys for the plantiffs, were found guilty of contemptuous conduct in the courtroom. They appeal from the contempt judgments.

The principal issue on appeal is whether the trial judge erred in directing verdicts for the defendants. We are convinced that he did err. Among the other issues presented which we deem necessary to discuss are the breadth of the official immunity available to defendants, the scope of discovery, the circumstances of the issuance of the search warrant, the companion diversity action filed by Verlina Brewer, the attorneys' fees and costs, and the contempt judgments. Before a discussion of the directed verdicts and these other issues, we believe it would be helpful to list the

names of the defendants and to summarize the amended complaint.

Federal Defendants

Marlin Johnson—Special Agent-in-Charge of Chicago office of the Federal Bureau of Investigation.

Robert Piper—Supervisor of the Racial Matters Squad of the FBI, Chicago office.

Roy Martin Mitchell—Special agent of the FBI, Chicago office, assigned to the Racial Matters Squad.

Wililam O'Neal—Paid informant for the FBI.

State Defendants

Cook County State's Attorney's Office

Edward Hanrahan—Cook County State's Attorney.

Richard Jalovec—Assistant State's Attorney and supervisor of the Special Prosecutions Unit of the State's Attorney's Office.

James Meltreger—Assistant State's Attorney.

Sheldon Sorosky—Assistant State's Attorney.

Raiders

Shooters: Daniel Groth, James Davis, Joseph Gorman, George Jones, Raymond Broderick, Edward Carmody, and John Ciszewski.

Nonshooters: Wiliam Corbett, Lynwood Harris, Fred Howard, Robert Hughes, Philip Joseph, William Kelly, and John Marusich.

All of the above defendants were Chicago police officers detailed to the Cook County State's Attorney's Office.

Chicago Police Crime Laboratory

David Purtell—Director.

John Koludrovic—Supervising officer of the Mobile Crime Laboratory Unit.

John Sadunas—Firearms examiner.

Chicago Police Department Internal Investigations Division ("IID")

Harry Ervanian—Captain, Chicago Police Department, director of IID.

Robert Kukowinski—Lieutenant, Chicago Police Department, head of Excessive Force Unit of the IID.

John Mulchrone—Deputy supervisor, Chicago Police Department.

John Meade—Sergeant, Chicago Police Department.

The amended complaint contains seventeen counts. For convenience we shall segregate the counts into different categories.

Hanrahan, Javolec, the raiders, and the four federal defendants are named in Counts 1, 2, 3, and 4. Counts 1 and 2 charge these defendants with in-

tentionally and negligently depriving the occupants of the apartment at 2337 West Monroe Street of their civil rights under the Constitution and under 42 U.S.C. § 1983 by participating in the planning and execution of the raid. Count 3 describes a conspiracy to deprive the occupants of the apartment of the equal protection of the laws, violating 42 U.S.C. §§ 1983, 1985(3), as well as the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments. Count 4 alleges, pursuant to 42 U.S.C. § 1986, that these defendants failed to prevent the wrongs perpetrated in violation of section 1985(3).

Counts 5 and 6 are directed against Hanrahan, Jalovec, and the police officers participating in the raid. Count 5 alleges intentional deprivation of the occupants' civil rights by false imprisonment in violation of their First, Fifth, and Fourteenth Amendment rights and their rights secured under 42 U.S.C. § 1983. Count 6 charges a conspiracy for the deprivation of the occupants' civil rights by false imprisonment under the First, Fifth, and Fourteenth Amendments and 42 U.S.C. §§ 1983 and 1985(3). Count 7 charges all defendants named in Count 6 and, in addition, Mitchell, Piper, and Johnson, with failing to prevent the alleged conspiracy and illegal acts described in Count 6, in violation of 42 U.S.C. § 1986.

Count 8 charges all defendants, except O'Neal, with conspiring to deprive the occupants of the equal protection of the laws and their due process rights by

malicious prosecution in violation of the First and Fourteenth Amendments and 42 U.S.C. §§ 1983 and 1985(3). Count 9 charges the same defendants as listed in Count 8 with intentional deprivation of civil rights by malicious prosecution in violation of 42 U.S.C. § 1983. Count 10 alleges that these defendants neglected to prevent harm from the execution of the conspiracy charged in Count 8, thereby violating 42 U.S.C. § 1986.

Count 11 charges a conspiracy among Hanrahan, Jalovec, Groth, O'Neal, Mitchell, Johnson, and Piper to obstruct the "due course of justice" with intent to deny the occupants of the apartment the equal protion of the laws and their Sixth Amendment right to counsel as protected by 42 U.S.C. § 1985(2).

Counts 12 and 13 charged the City of Chicago and Cook County with the deprivation of the civil rights of the occupants of the apartment, directly and under the doctrine of *respondeat superior*. The district court dismissed these counts and there is no appeal from this ruling.

Count 14 is a wrongful death action against Hanrahan, Jalovec, the raiders, and the four federal defendants under both federal and state law by the estates of Fred Hampton and Mark Clark through their respective administratrices.

Verlina Brewer is the sole plaintiff in Counts 15, 16, and 17 which are based on diversity jurisdiction. These counts name Hanrahan, Jalovec, and the raiders as defendants. Count 15 charges assault and bat-

tery, Count 16, false imprisonment, and Count 17, malicious prosecution.

II. DIRECTED VERDICT

We first consider the rulings of the district court directing a verdict for twenty-one of the defendants at the close of plaintiffs' case in chief, and for the remaining seven defendants (who fired their weapons during the raid) after the jury was deadlocked. On appeal plaintiffs assert that the trial court disregarded the proper legal standard in granting the directed verdicts and that their claims justified submission to the jury.

This court has enunciated on numerous occasions the rule that a motion for a directed verdict must be denied when the evidence reveals that reasonable persons "in a fair and impartial exercise of their judgment may draw different conclusions therefrom." *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 287 (7th Cir.), *cert. denied*, 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969). The function of the trial court considering such a motion was further discussed in *Byrd* v. *Brishke*, 466 F.2d 6, 9 (7th Cir. 1972), a civil rights action involving facts similar to the case at bar. In *Byrd* we emphatically stated that the court is not to substitute its judgment for that of the jury and accordingly we reversed a ruling by the district judge granting defendants' motion for a directed verdict on the grounds that the court had weighed the testimonial evidence and had passed on the credibility of the witnesses. *Id.* The function of

the trial judge is to review the testimony most strongly against the moving party "[a]nd if there is doubt, or the question is close, the case should go to the jury." *Keaton* v. *Atchison, Topeka & Santa Fe RR. Co.*, 321 F.2d 317, 318 (7th Cir. 1963).

On appeal our task is equally well established. We must consider all the evidence—disregarding conflicting, unfavorable testimony—and extract all the reasonable inferences therefrom. Viewing such evidence and inferences in the light most favorable to the plaintiffs, the question is whether a prima facie case has been presented against any of the defendants. *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070, 95 S.Ct. 657, 42 L.Ed.2d 666 (1974); *Kish* v. *Norfolk & Western Ry. Co.*, 426 F.2d 1132 (7th Cir. 1970); *Pinkowski* v. *Sherman Hotel*, 313 F.2d 190 (7th Cir. 1963).

At the conclusion of this trial, the district judge prepared a lengthy "Summary" of the evidence which illuminated the court's rationale in directing the verdicts of April 15 and June 20, 1977.[4] Upon a comparison of the extensive record, including the received and improperly rejected evidence, and the trial judge's Summary, there can be no doubt that the district judge erred by supporting his grant of the directed

[4] Judge Perry elected to provide the parties with a Summary of the evidence approximately one month after the trial's conclusion. Although the judge stated in a letter attached to the Summary that it was not intended to be an official memorandum in the case, we see no reason why the Summary is not a part of the record and therefore properly before us.

verdicts with evidence which was considered in the light most favorable to the defendants. Furthermore, we are compelled to conclude that, once again, as in *Byrd*, the district judge weighed the evidence, thereby invading the province of the jury.

We recite the facts adduced at trial to determine whether the plaintiffs presented a prima facie case against any defendant which warranted submission to a jury. The facts can be considered in three stages: pre-raid, the raid itself, and post-raid.

A. *Pre-Raid*

In August 1967 the FBI initiated a national covert counterintelligence program called "COINTELPRO" which was designed to neutralize a variety of political organizations including those which the Bureau characterized as "Black Nationalist Hate Groups." Directives from Washington ordered the Chicago office of the FBI to implement the program in the Chicago area. While the Black Panther Party was not an original target of this program, it was included with the ambit of COINTELPRO's scrutiny by September 1968.[5] The trial court's Summary stated that the "purpose of the counterintelligence program, as it was implemented in Chicago as to the Panthers was to prevent violence." The plaintiffs, however, presented considerable evidence to compel a different con-

[5] The organizations originally the subject of COINTELPRO included the Southern Christian Leadership Conference (SCLC), the Student Nonviolent Coordinating Committee (SNCC), and the Nation of Islam.

clusion.[6] Perhaps the most damning evidence indicating the COINTELPRO was intended to do much more than simply "prevent violence" comes from the files of the FBI itself. An FBI memorandum from February 1968 described the goals of COINTELPRO as:

> 1. Prevent a coalition of militant black nationalist groups . . . .
> 2. Prevent the rise of a messiah who could unify and electrify the militant nationalist movement . . . Martin Luther King, Stokely Carmichael and Elijah Muhammad all aspire to this position . . . .
> 3. Prevent violence on the part of black nationalist groups . . . .
> 4. Prevent militant black nationalist groups and leaders from gaining respectability by discrediting them . . . .
> 5. . . . prevent the long-range growth of militant black nationalist organizations, especially among youth.

Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, The FBI's Covert Action Program to Destroy the Black Panther Party, S.Rep. No. 94-755, 94th Cong., 2d Sess., 187 (1976). These goals were incorporated into the various directives which Marlin Johnson, the special agent-in-charge of the Chicago FBI office, received instructing him to establish the program in Chicago.

[6] Further, the trial court's restrictions on discovery and its questionable evidentiary rulings hampered the plaintiffs' ability to marshall evidence to substantiate their contentions. *See infra*, pp. 639-642.

The national COINTELPRO program adopted a variety of tactics which seemingly were aimed not at preventing violence, but at neutralizing the BPP as a political entity. These tactics included efforts to discredit the BPP among "liberal" whites, the promotion of violent conflicts between the BPP and other groups,[7] the encouragement of dissension within the BPP, and the disruption of the BPP's Breakfast Program for Children. Memoranda from Washington directing the local employment of such tactics were transmitted to Johnson, Robert Piper (after March 1969 the chief of the Racial Matters Squad of the Chicago FBI which was responsible for FBI programs regarding the BPP), and Roy M. Mitchell (special agent assigned to the Racial Matters Squad in Chicago).

The evidence presented by plaintiffs indicates that when the local chapter of the BPP opened in Chicago in November 1968, the Chicago FBI was quick to implement the tactics mandated by Washington. One of the key figures in the Chicago FBI's program to disrupt the Panthers was William O'Neal. O'Neal was a paid FBI informant whom Mitchell originally had contacted while O'Neal was incarcerated in the Cook County Jail. Mitchell recontacted O'Neal and instructed him to join the BPP. O'Neal walked into

[7] For example, in Southern California the FBI mounted a covert operation to escalate a "gang war" between the BPP and an organization called the "United Slaves." This gang war resulted in the killing of four Panthers by members of United Slaves and numerous beatings and shootings.

the BPP office at 2350 West Madison Street the day it opened in November 1968 and joined, soon becoming the local chief of security for the Panthers.

The local FBI was able the effectuate many of its plans to disrupt the BPP through O'Neal. O'Neal informed Mitchell about a proposed merger between the BPP and a local black gang, the Blackstone Rangers. The Chicago office, with Johnson's approval, then sent an anonymous letter to Jeff Fort, the leader of the Rangers, telling Fort that the Panthers had a "hit out" on him. The purpose of the letter was to prevent a merger and to induce the Rangers to initiate reprisals against the BPP. O'Neal also falsely accused a member of the Vice Lords, another black Chicago gang, of being a police informant, thereby squelching another possible merger. O'Neal, according to plaintiffs' evidence, encouraged the Panthers to initiate and participate in various criminal activities, to obtain more weapons, and to increase their use of violent tactics.

O'Neal also facilitated the FBI's efforts to discredit the BPP leadership and to frustrate their attempts to garner support among white groups. O'Neal provided Mitchell with information that enabled local police to serve an arrest warrant on Fred Hampton, the leader of the BPP in Chicago, just prior to his appearance on a local television interview show. O'Neal also encouraged the distribution of racist BPP cartoons, thereby fostering a rift between the BPP and the Students for a Democratic Society (SDS). For his efforts, O'Neal received sev-

eral pay raises from Mitchell with Johnson's approval.[8] After March 1969 Piper also lent his approval to O'Neal's efforts as a part of the FBI's counterintelligence program.

The FBI had other means of monitoring the BPP in Chicago. Johnson and Piper requested and received authorization for a warrantless wiretap on BPP headquarters. And in June 1969 the FBI, based on information provided by O'Neal, executed a fugitive arrest warrant at Panther headquarters. No shots were fired; however, several Panthers were arrested for harboring a fugitive and weapons were seized. All the charges against the arrested Panthers ultimately were dropped.

The FBI in Washington urged its offices implementing COINTELPRO to develop liaisons and working relationships with local law enforcement officials to comply with the FBI's mandate to provide information to these agencies as well as to help effectuate the FBI's counterintelligence goals. In Chicago the FBI had an ally which also was quite concerned about the growth of militant black groups. In November 1968 Edward V. Hanrahan was elected Cook County State's Attorney. Hanrahan appointed Richard Jalovec an Assistant State's Attorney and made him the chief of the office's Special Prosecutions Unit (SPU). By April 1969 the primary focus of the SPU was on black street gangs. About this same

[8] From January 1969 to June 1970, O'Neal's monthly pay for his services as an FBI informant ranged from $100 to $500.

time Mitchell contacted Jalovec and told him that the FBI had an informant, O'Neal, within the Chicago BPP.

Before June 1969 the State's Attorney's Office had relied on its own police force which it used only for routine matters. At that time, however, the State's Attorney's Office requested that nine Chicago police officers—Groth, Davis, Carmody, Jones, Ciszewski, Howard, Marusich, Kelly, and Joseph—be assigned to the SPU. Groth was next in command after Jalovec, to whom all the officers reported.

Tension and hostilities between the BPP and local law enforcement agencies in Chicago escalated throughout the summer and fall of 1969. Shooting incidents involving Chicago police and Panthers occurred at the BPP headquarters in July and October. On July 21 and October 3 the BPP headquarters was ransacked by Chicago police. And on November 13, 1969 two Chicago policemen were killed in an ambush-shootout with Jake Winters, who was closely associated with the BPP.[9] Winters also was killed and seven other Chicago police officers were wounded.

On the evening of the Winters incident, Mitchell met with O'Neal and showed him photographs of the dead police officers. Soon thereafter, on November 19, Mitchell again met with O'Neal and with O'Neal's aid constructed a floorplan of the apartment at 2337

[9] Testimony differed as to whether Winters was a member at the time of the shootout or whether he had been expelled from the Party prior to the incident. In any event, he was close to the Panthers and was eulogized by Hampton as a fallen comrade.

West Monroe Street to which Hampton recently had moved. The floorplan included the layout of the rooms, the placement of doors and furniture, the identity of the apartment's occupants and frequent visitors, and the location of the bedroom which Hampton shared with Deborah Johnson. And, either on the basis of this or previous conversations with O'Neal, Mitchell compiled a list of weapons which O'Neal said were in the apartment and incorporated the list into a memorandum dated November 21. This memorandum, however, failed to mention the presence in the apartment of two federally illegal weapons—a sawed-off shotgun and a stolen police riot gun—which O'Neal had told Mitchell about. There is evidence that the appropriate FBI procedure would have been to notify the Alcohol, Firearms and Tobacco Division of the Treasury Department about these weapons. This was not done.

After his meeting with O'Neal on November 19, Mitchell met with members of the Chicago Police Department's Gang Intelligence Unit (GIU) and conveyed to them the information contained in the floorplan. Mitchell also told them that a large quantity of weapons was stored at the apartment, including the sawed-off shotgun and the stolen police gun.[10] Piper was aware of the transfer of this information to the GIU and at a meeting with Johnson informed

[10] Mitchell, however, never mentioned these federally illegal weapons in writing until eight days after the December 4 raid on the apartment.

him of the same.[11] On the basis of this information, the GIU planned a raid on the apartment to seize the weapons.

Shortly thereafter O'Neal told Mitchell that the weapons had been removed from the Monroe Street apartment. Mitchell relayed this information to Piper who in turn informed Johnson. Johnson ordered Piper to inform all local agencies which had received the prior information about the weapons that they had been removed. Piper transmitted this order to Mitchell, who phoned Officer Bizewski of the GIU. Johnson, on November 24, also phoned Thomas Lyons, director of the GIU, and told him that the BPP expected the raid and had removed the weapons from the apartment. Lyons told Johnson that he would cancel the raid.

Within two days of the cancellation of the GIU raid, Mitchell called Jalovec and told him that the weapons had been returned to the apartment.[12] Mitchell also informed Jalovec that Hampton and Johnson were living at the apartment, that other members of the BPP frequented the apartment, and that a variety of weapons, illegally purchased, was kept there. About the first of December Mitchell told Jalovec that a sawed-off shotgun and a stolen police gun were in the apartment. Shortly thereafter, according to plaintiffs' evidence, Mitchell met with

[11] The SPU also was informed about the presence of a large quantity of weapons at 2337 West Monroe Street.

[12] From late November to December 4, 1969, Mitchell had five to seven conversations with Jalovec.

Jalovec and Groth and, with Piper's prior approval, showed them the floorplan of the West Monroe Street apartment. Mitchell also told them that a BPP political education meeting was scheduled for the evening of December 3 and that the occupants of the apartment likely would be absent then.

At trial, Groth did not recall attending the meeting with Mitchell. Groth did claim, however, to have received a phone call sometime during the late afternoon or evening of December 2 from an unidentified informant who provided information paralleling the information transmitted by Mitchell. Groth stated that this unidentified informant—who was unpaid—was a member of the BPP.[13]

Groth met with Jalovec on December 3 and had a discussion with him about the information Groth received from his informant. Jalovec said that he had received essentially the same information from Mitchell. Groth also told Jalovec that he had surveyed the premises at 2337 West Monroe Street on his way to work that morning. Later that day Groth instructed Davis and Kelly to survey the premises, and they returned with a street diagram of the surrounding area. Groth told Davis, Kelly, and a few other officers assigned to the SPU that they would be going to the apartment at 8:00 p.m. that night to search the premises for illegal weapons.

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[13] The plaintiffs question whether Groth's informant in fact ever existed. The trial court did not require Groth to disclose the identity of his informant. *See infra*, pp. 635-639.

At midday on December 3 Jalovec and Groth met with Hanrahan and recounted the information they had received from their sources. At this meeting Jalovec told Hanrahan that they intended to obtain a search warrant for the Monroe Street apartment. Jalovec and Groth drafted the warrant. The affidavit stated that Jalovec had received information from a reliable informant—Mitchell was not mentioned by name—that sawed-off shotguns and other weapons were kept in the apartment. It also stated that a reliable informant had told Groth that the apartment contained numerous weapons including three sawed-off shotguns. The warrant and affidavit were shown to Hanrahan and then taken to a Cook County Circuit judge who was formerly Hanrahan's first assistant when Hanrahan was United States Attorney. The warrant was issued that afternoon.

After the warrant was issued, Jalovec and Groth busied themselves with the final preparations for its execution. They decided that fourteen men would take part in the mission. Groth described the plan to some of the police officers who would be accompanying him. Jalovec phoned the Chicago Police Department to obtain approval to bring certain weapons, including a machine gun, when they served the search warrant. Jalovec also approved Groth's revised decision to serve the warrant at 4:00 a.m., rather than in the evening, so that the sleeping occupants in the apartment could be taken by surprise. At trial Jalovec and Groth indicated that they did not dis-

cuss the use of tear gas, sound equipment, or other means to gain entry to the apartment.

Jalovec met with Hanrahan and detailed the final plan for the search of the apartment. He told him that Groth would be leading twelve to fourteen men. Again the testimony indicated that there was no discussion of alternative ways of gaining entry to the apartment or of the use of any equipment besides guns. Hanrahan told Jalovec to tell the men to be careful. Jalovec related his conversation with Hanrahan to Groth, and told Groth to call him at home after the raid.

This same day, on December 3, 1969, Johnson and Piper approved a counterintelligence memorandum sent to the Director in Washington. The memorandum stated that local police[14] planned "a positive course of action" based on the information regarding the West Monroe Street apartment which the Chicago FBI had provided local law enforcement officials.

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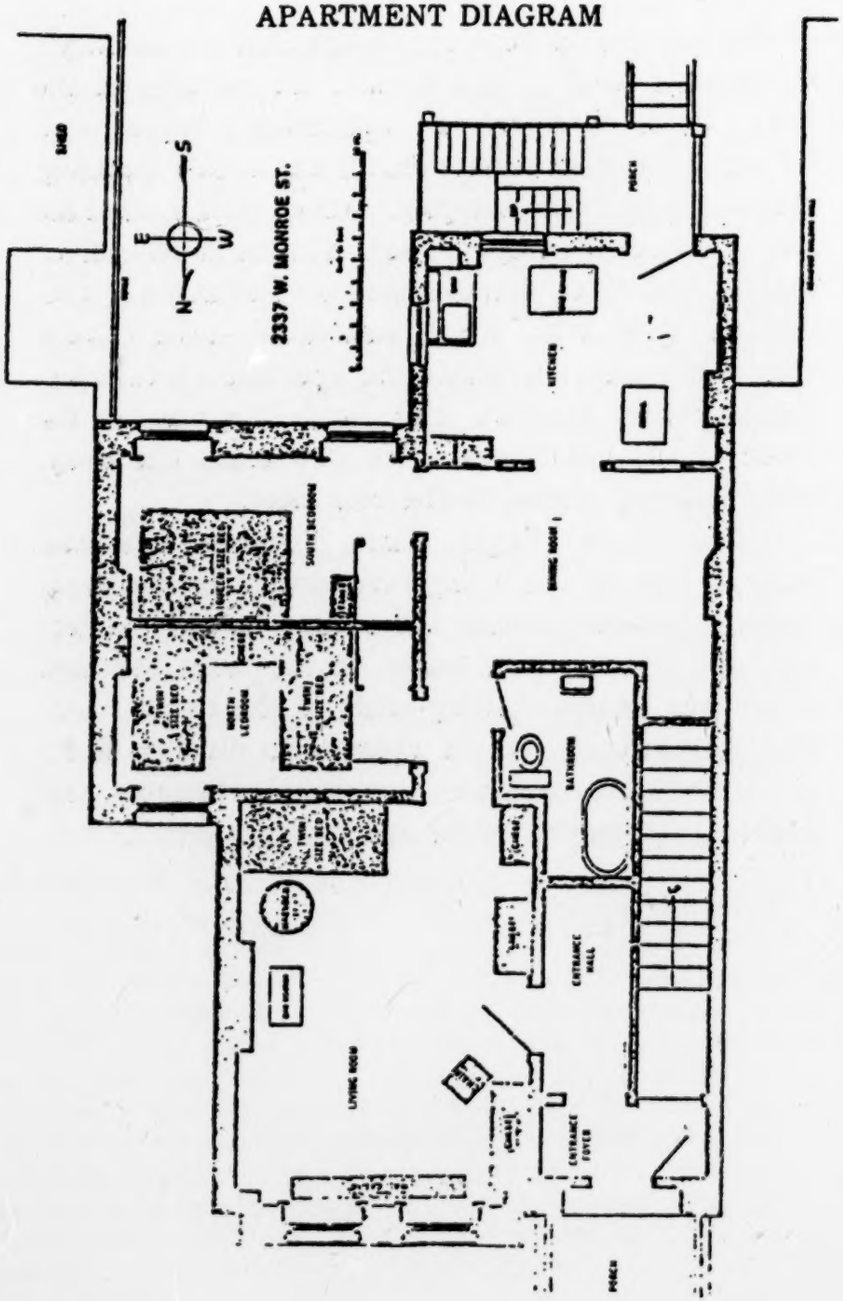
[14] The FBI document refers to action planned by "Chicago police." This, however, does not necessarily indicate that the local FBI thought that the Chicago Police Department planned an action and that it was unaware of the action planned by the SPU of the State's Attorney's Office. The officers detailed to the SPU were, in fact, Chicago police officers. More importantly, other FBI documents indicate that the local FBI at other times referred to police actions of the SPU as actions taken by Chicago police. For example, a December 10 counterintelligence memorandum sent from Johnson's office to Washington stated that Hampton was killed by "Chicago police."

B. *Raid*

The fourteen raiders met at the State's Attorney's Office for a briefing at 4:00 a.m. the morning of the raid. Groth described the apartment's layout and informed the other officers that it was a BPP dwelling frequented by Fred Hampton. Armed with a machine gun, a sawed-off shotgun, a semi-automatic .30-caliber carbine, and other weapons, they arrived at the apartment at 4:30 a.m. Groth instructed seven officers (the nonshooters) to guard the apartment's exterior. Groth, Jones, Gorman, and Davis approached the front of the apartment while Broderick, Carmody, and Ciszewski circled to the rear door.

Before the raid began, Clark, Truelock, Bell, and Harris, were in the living room on chairs and mattresses scattered around the room. Satchel, Anderson, and Brewer were asleep in the front bedroom which was located directly south of the living room. The rear bedroom of the apartment, directly south of the front bedroom, was occupied by Hampton and Johnson. A diagram of the apartment is shown here:

APARTMENT DIAGRAM



A factual dispute exists as to the activity inside the apartment. Plaintiffs' testimony depicts a violent, well-armed, unprovoked attack on the apartment. Plaintiffs testified that the officers did not announce their purpose when they arrived at the apartment. After hearing a knock at the apartment door, Truelock and Bell ran to the rear bedroom to awaken Hampton. Davis burst through the door into the living room and began firing into the darkened room. Clark, in the northwest part of the room about three or four feet from the door, was struck in the heart by a bullet from Davis' rifle. According to Harris, Clark's gun went off as he fell. Groth also began firing into the living room from the apartment doorway. Harris was shot as she lay in bed. She testified at the trial that she neither fired nor handled a gun during the raid.

The attack from the rear of the apartment was precipitated by the sound of a shotgun blast from within. Carmody broke through the back door and entered the kitchen. Using a .38 revolver, he fired five times. Corbett, Ciszewski, and Broderick followed him into the kitchen, the latter two firing into the two bedrooms from the dining room area. Bell, Truelock, and Johnson emerged from the back bedroom during a pause in the shooting.

Meanwhile, Gorman had entered the living room and began firing his machine gun into the south wall toward the bedrooms. Davis also began firing into the south wall. Carmody entered the back bedroom and

found Hampton lying on his bed.[15] Carmody went to the head of the bed clutching a revolver in his right hand. During the course of the firing, Hampton was shot several times in the body and the head. The bullets which went through his brain were never found. Carmody emerged from the bedroom dragging Hampton's body by the left wrist. In Carmody's firearms report, he indicated that he had critically wounded a suspect. He recorded that his first shot was fired from a distance of ten feet and noted the distance of his second shot by a question mark.

Meanwhile the other shooters were moving toward the front bedroom where Satchel, Anderson, and Brewer lay huddled on the floor. Broderick, located in the bathroom, and Ciszewski, positioned in the dining room, fired several blasts from their shotguns into the front bedroom. Simultaneously, Gorman advanced down the hallway and approached this bedroom. Seeing the forms of Anderson and Brewer rising between the beds, he aimed and fired his machine gun into the bedroom. At that point Carmody charged through the front bedroom doorway and the occupants surrendered. When the guns were stilled, Satchel had been struck four times, Anderson and

[15] Plaintiffs introduced the expert testimony of Eleanor Berman, chief toxicologist of Cook County Hospital, indicating that Hampton was drugged at the time of the raid. On the basis of blood samples extracted from his body, she concluded that secobarbital was present in Hampton's system at the time of his death in an amount which would make it difficult for him to awaken. Bell and O'Neal testified that Hampton was not a drug user.

Brewer, twice. All three plaintiffs denied firing weapons. While the survivors were gathered into the kitchen the nonshooters entered the apartment. According to the survivors' testimony, they were then physically and verbally abused.

The evidence introduced by defendants at trial produces a portrait of the incident which barely resembles the one depicted by plaintiffs. All the officers testified that they were fired on from within the apartment as they attempted to serve the search warrant. Groth testified that he and his men announced their purpose to the occupants on the morning of December 4 while standing on the apartment porch. After receiving no response, Davis struck down the front door of the apartment. As he lunged into the living room a shotgun blast flashed through the room from Clark's gun. Seeing Harris' gun directed at the front entrance door, he fired and hit her in the leg. Fearing for Davis' life, Groth stepped into the living room and was met by the barrel of Harris' gun aimed in his direction; believing that she had fired a shot at him, Groth responded by firing at her. Davis noticed Clark rising from his chair, "pumping" his shotgun, and turning toward him. Davis fired three shots while simultaneously rushing at Clark. A struggle for Clark's gun followed and the men dropped to the floor. In the meantime, Gorman had entered the living room and grabbed the shotgun from Harris who was sitting on a bed next to the south wall of the living room. The officers testified that during the next few seconds they observed flashes

of firing exiting from both bedrooms. Testimony was given that a cease-fire was called, but was broken by two shots, one from each bedroom.

At the same time, Carmody broke through the kitchen door into the rear of the apartment. Observing flashes of firing exiting from the back bedroom, he lunged into the kitchen. He advanced to a position in the dining room and fired into the bedroom. Ciszewski and Broderick followed Carmody's lead. Ciszewski pointed his flashlight into the back bedroom and Bell surrendered.

A second cease-fire was called. It too was broken when flashes were observed again in the rear of the apartment. When Gorman and Davis fired through the living room wall, their volleys were returned by more firing from the bedroom.

Truelock and Johnson emerged from the back room during a third cease-fire. Carmody then entered the back bedroom where he saw Hampton's body on the bed. While Carmody dragged the body from the room, Ciszewski entered to remove weapons. A bullet ripped through the north wall of the bedroom and struck Ciszewski in the ankle.

Having secured the living room and back bedroom, the raiders concentrated their efforts on the front bedroom. Gorman ran to the bedroom after shooting through the south wall of the living room. He fired his machine gun into the front bedroom as he saw Anderson rising between the beds with a shotgun clutched in his bands. Anderson was hit by Gorman's volley. Gorman also spotted Brewer with an object

in her hands, but no shots were exchanged. Carmody and Broderick also fired into the north bedroom. According to a tape of a radio dispatcher's communication with the raiders that morning, the apartment was under control within seven minutes.

In addition to the raiders' testimony, the statements of several plaintiffs given to their lawyers after the incident were presented by the defense at trial. In these statements, both sworn and unsworn, several plaintiffs said they picked up weapons during the course of the raid and Truelock said he fired two shots at the raiders. These statements were offered as further proof that the officers were fired at and that they perceived themselves to be in great danger during the course of the raid.

Countering this defense evidence and in support of their trial testimony in which the survivors denied firing at the raiders, plaintiffs introduced the expert testimony of Robert Zimmers, a ballistics examiner with the FBI crime laboratory. Zimmers also was qualified as an expert to testify regarding the angle a shot entered a surface based on evidence of its impact point. According to his testimony, he examined the weapons seized from the apartment, the shooters' weapons and their bullets, bullet fragments, and shotgun casings and cartridges found in the apartment. He also analyzed impact points on the walls and furniture in the apartment. On the basis of this examination and his analysis, he concluded that there was no evidence of a shotgun blast coming from the corner of the living room where Harris was

during the raid. He also concluded that there was no evidence of shotgun shots exiting from the front bedroom where Satchel, Anderson, and Brewer were sleeping, and found no evidence of a shot being fired from within the rear bedroom where Johnson, Hampton, Truelock, and Bell were located.

On the other hand, Zimmers determined that there were forty-two bullet holes created by shots fired from the living room through its south wall into the front bedroom. Additionally, there were thirty-three bullet holes of entrance found in the south wall of the front bedroom (the wall between the front and rear bedrooms), twenty-five of which entered from the living room. There were fourteen bullet holes of entrance found in the south wall of the back bedroom occupied by Hampton and Johnson. Six of these bullet holes came from shots that originated in the doorway of the north bedroom. Zimmers also testified that on the basis of his examination only one shot shell was identified with the seized weapons and that this shell corresponded with a hole of exit in the living room door; further, he stated that a bullet removed from the body of Hampton was fired from the .30-caliber carbine carried on the raid by Davis.

C. *Post-Raid*

After the firing ceased, Gorman telephoned Jalovec from the back bedroom to report what occurred and to inquire whether Jalovec would be directing the evidence collection at the apartment. Jalovec responded that the men should leave the apartment

immediately to avoid creating a riotous situation and should bring the seized weapons to the State's Attorney's Office. The other raiders were searching the apartment, overturning furniture and seizing books and files in the process. The raiders retrieved bullets and other ballistics material but failed to identify the recovered items. According to Groth, the seized weapons were neither tagged for identification purposes nor fingerprinted, and the locations were not specifically recorded. Consequently, when the Mobile Crime Unit of the Chicago Police Department arrived at approximately 5:15 a.m. to collect evidence, its task was hindered greatly by the raiders' search. The Unit, headed by Koludrovic, nevertheless recovered a number of ballistics items from throughout the apartment which were taken to department heaquarters for examination by experts in firearms identification. The officers retained their own weapons, and the weapons found inside the apartment were taken to the State's Attorney's Office.

Immediately after the raid, the four wounded occupants were taken to a hospital and the three other survivors were incarcerated in Cook County Jail. On the basis of sworn complaints which stated that the plaintiffs fired at the raiders, charges of attempted murder, aggravated battery, and unlawful use of weapons were filed against the survivors. Bond was set for each at $100,000. (Several survivors remained in jail until December 21 when their bond was lowered.)

As the day unfolded, an atmosphere of confusion and tension developed in Chicago's black community. Hanrahan met with the raiders and decided to engage in a series of media activities because "there were no methods of getting the officers' story to the public as effectively." The initial phase began around noon on December 4 when he issued a statement to the press in the presence of Jalovec, Groth, and other raiders. Although aware of conflicting stories, he adopted the raiders' version of the incident and urged the support of the citizens of Chicago for the courageous actions of the police officers. He frequently emphasized his words by pointing to a display of seized weapons and, in particular, to a revolver which he said was "used by Hampton in the course of the attack on the police."

On December 8, amidst the continuing storm of controversy surrounding the raid, Hanrahan called his second press conference. Reading from a prepared statement, he reiterated the raiders' account of the incident and summarily dispelled conflicting reports referred to by reporters. Despite further potential pre-trial prejudice to the survivors' criminal defense, Hanrahan continued to publicize the incident and decided to employ additional media tactics to promote the raiders' version of the incident. At his behest the *Chicago Tribune* published an exclusive interview with the raiders on December 11. The article stated that the occupants initiated the firing and contained photographs provided by the State's Attorney's Office which showed holes in walls and doors

of the apartment which purportedly represented shots originating from guns fired in the bedrooms. At trial a reporter for the newspaper testified that his sole source of material for the article was the information obtained from Hanrahan, Jalovec, and the raiders during an interview.

The following day a reenactment of the raid was filmed by CBS-TV in Chicago. Hanrahan asked the broadcasting company to film the story for television without editing by CBS. A set was constructed at the State's Attorney's Office, and Jalovec assisted the production directors. All the raiders were present for the event and those who participated in the reenactment were informed that the film could be cut as the raiders desired. To insure the production's conformity with his previous press statements, Hanrahan visited the set during portions of the taping. The broadcast was aired the same evening. Hanrahan held his final press conference the following day. When confronted with questions from reporters that focused on the photographic misrepresentations contained in the *Chicago Tribune* article, Hanrahan again confirmed the accuracy of the officers' stories without investigating the conflicting reports. At trial Hanrahan testified that he believed his publicity efforts were necessary to maintain the integrity and reputation of law enforcement in the community.

The role of the federal defendants continued in the post-raid period. Mitchell, Piper, and Johnson testified that they first learned of the raid through the news media the morning of December 4. Later that

day, they received information from the State's Attorney's Office that Hampton's body had been positively identified. Johnson then approved the transmission of an "urgent" teletype to FBI headquarters in Washington reporting the raid. Pursuant to Piper's instructions, Mitchell spoke with Jalovec and Groth at the State's Attorney's Office to obtain more details. At this meeting Jalovec asked Mitchell whether he would be concerned if "it got out" that Mitchell was the source of the preliminary information for the raid.

The FBI continued to monitor BPP activities through O'Neal's assistance, and it was during this early post-raid period that FBI officials wrote a series of memoranda highlighting their involvement in the raid. Piper sent a memorandum to Bureau headquarters on December 11 which requested a bonus for O'Neal. The request was "justified" on the grounds that the raid was based on information furnished by O'Neal and that this information was not available from any other source. Shortly thereafter, a three hundred dollar bonus was approved. On December 12 Mitchell wrote a memorandum which stated for the first time that federally illegal weapons had been present in the apartment a few days prior to the raid. The memorandum also noted that the FBI communicated with the State's Attorney's Office around the first of December regarding the illegal weapons. Mitchell's memorandum was not sent to the Washington office of the FBI but instead was placed in the Chicago FBI's "O'Neal" file which also

contained the floorplan that had been furnished to Mitchell prior to the raid.

A series of investigations and inquests followed the December 4 raid. On December 12 Hanrahan requested Chicago Police Superintendent Conlisk to initiate an internal police investigation. Internal investigations generally were conducted by Ervanian and Kukowinski, director of the Internal Investigations Division of the Chicago Police Department (IID) and head of the Excessive Force Unit of the IID, respectively. This investigation, however, was placed under the direct supervision of Mulchrone, a deputy police superintendent. Meade, a police department legal advisor, was placed in charge of the investigation by Mulchrone. Meade designed a few questions based on Groth's official report and typed in answers which, as Mulchrone stated, "would justify the use of entry and force by the officers." Ervanian and Kukowinski were informed of the limited nature of the inquiry and of Meade's and Mulchrone's decision that all of the raiders' statements were to be identical. Although dismayed at the proposed procedures, neither protested. Copies of Meade's material were distributed to Assistant State's Attorneys Sorosky and Meltreger who were advising the officers at the December 16 questioning. Jalovec, Kukowinski, Ervanian, Mulchrone, and Meade also were present at the interviews. Prior to the commencement of the inquiry, Groth was shown the prearranged questions and answers and then requested to give his account of the raid. Thereafter the other raiders met pri-

vately with Jalovec and Sorosky and were shown copies of both the Meade material and Groth's statement. During the interviews each officer was asked substantially the same four questions:

> Does Groth's statement describe what occurred at the apartment?
>
> Did you use excessive force in effecting these arrests?
>
> Did other officers use excessive force in effecting these arrests?

Is there anything you wish to add? Each of the raiders answered "yes" to the first question and "no" to the next two. They gave a varied assortment of immaterial answers to the fourth question.[16] The

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[16] For example, Officer Kelly stated:

> A Yes, I have two questions. Am I charged with any crime?
>
> Q You are not charged with any allegations, no.
>
> A My second is not a question, it is a statement. I have known Sergeant Groth personally for approximately eight or more years. I have never seen him act in any manner other than that which would bring praise and credit to the Chicago Police Department. That is it.

Officer Jones said:

> I am Black and proud of being Black and a member of the Chicago Police Department. I have worked with these officers, both black and white for over six months and consider them to be of highest professional caliber and a real credit to the Department. The courage they exhibited that night made me even prouder of my associates. I feel strongly about the advancement of Blacks on the Chicago Police Department and deeply sorry that criminal elements are using this incident to attempt to destroy mutual understanding and respect.

survivors were asked to participate in the IID investigation by filing complaints, but declined.

While the internal investigation was underway, Sadunas, a ballistics analyst for the Chicago Police Department Crime Laboratory, had been conducting a series of firearms identification tests based on the materials recovered by the Mobile Crime Laboratory Unit. Sadunas was urged by the State's Attorney's Office and some of the raiders to complete his report as quickly as possible. On December 17 he issued his findings which included an identification of two shells with the gun allegedly fired by Brenda Harris. Sadunas, however, failed to include the raiders' weapons in his testings. The Sadunas report was sent to the IID for consideration. On December 18, six days after Hanrahan's request for the investigation, the IID submitted its report to Conlisk. He determined that no disciplinary action was warranted against the fourteen raiders. At trial both Kukowinski and Ervanian characterized the investigation as less than thorough and admitted that the irregular nature of the proceeding might be attributed to the involvement of the State's Attorney's Office. According to Mulchrone, "[the] purpose of the investigation was not to in any way serve to later destroy [the police officers'] testimony before a criminal trial" which the IID knew was going to take place in Cook County Circuit Court.

Additional state investigations during the post-raid period included a January 1970 Cook County

Special Coroner's Inquest into the deaths of Hampton and Clark. Testimony was taken from the raiders and Crime Laboratory personnel. The survivors refused to testify at the inquest. A finding of justifiable homicide was made by the Coroner's office. Plaintiffs challenged this finding at trial with evidence that Groth made several statements at the inquest which he later contradicted, including testimony in which he denied being aware prior to the raid of the interior design of the apartment.

Also, during the month of January, a Cook County grand jury returned an indictment for attempted murder and aggravated battery against the seven survivors of the raid. Hanrahan was responsible for the presentation to the grand jury of evidence consisting mainly of the police officers' testimony and the Sadunas report.

A federal grand jury had been convened in December 1969 to investigate whether the occupants' civil rights had been violated. Jerris Leonard, Assistant Attorney General in charge of the Civil Rights Division, was assigned by the Department of Justice to present evidence to the grand jury, and Leonard Treviranus served as case agent for the grand jury on behalf of the FBI.[17] Johnson instructed Trevi-

[17] Plaintiffs attempted to join Leonard as a coconspirator-defendant in December 1975 after receiving certain discovery materials. The court denied the motion and plaintiffs have not raised the ruling on appeal. The record fails to reveal whether Treviranus was intended to be named as a defendant in the motion.

ranus that all requests for evidence from the grand jury and Leonard were to be channelled through Johnson. Additionally, Johnson and Leonard met throughout the investigations and Leonard revealed to Johnson what information he was seeking for presentation to the grand jury.

The grand jury began to hear evidence in January 1970 and Johnson was requested to appear before it to testify concerning the June 1969 raid on the BPP headquarters. Treviranus sent a memorandum to FBI headquarters in Washington which assured that Johnson's testimony would not relate to "the circumstances" of the December 4 raid, insuring that "no exposure" to the Bureau would occur. Leonard, however, informed Johnson that the grand jury was interested additionally in what information the FBI had supplied to local authorities prior to the raid. Johnson asked a member of his staff to brief him on the information that had been disseminated. Although Johnson knew Mitchell had provided information about the BPP to local authorities, he asked neither Mitchell nor Piper about these communications. On February 11, 1970 Johnson testified before the grand jury. He stated that the Chicago office of the FBI was not aware that illegal weapons were in the apartment prior to the raid. Additionally, Johnson failed to mention that a floorplan was furnished by Mitchell to the State's Attorney's Office. On the same day that Johnson testified, Mitchell wrote the FBI Director on behalf of the Chicago office for authoriza-

tion to continue paying O'Neal as an informant. In the letter Mitchell justified the request, as Piper had justified the earlier bonus for O'Neal, by reminding headquarters that O'Neal had provided a detailed floorplan of the apartment, as well as other information, which subsequently "saved injury and possible death to police officers" participating in the December 4 raid.

Neither Mitchell nor Piper testified before the grand jury. The Racial Matters Squad, however, which was under Piper's supervision, regularly provided Treviranus with selective intelligence information on the BPP and the raid. Included in this information flow were Bureau files on the survivors, a report on Hampton's activities one week before the raid, and Mitchell's November 21 weapons memorandum listing the legally purchased weapons reported by O'Neal to be in the apartment. Conspicuously absent was information on the floorplan and Mitchell's December 12 memorandum concerning the presence of illegal weapons in the apartment prior to the raid. O'Neal was never made available to testify before the grand jury nor to be interviewed by the prosecutors in charge of the grand jury despite Bureau instructions issued in September 1969 that efforts should be made to convince informants to testify about information they had furnished concerning the BPP.

During the first weeks of February 1970, Zimmers conducted exhaustive tests of the ballistics evidence

and weapons involved in the raid. Zimmers concluded that the spent shells identified in the Sadunas report as having been fired from Brenda Harris' gun actually had been fired from Officer Ciszewski's weapon. Sadunas was informed of this discrepancy in mid-February. Upon receiving the evidence and weapons from the FBI, Sadunas retested the shotshells and test-fired Ciszewski's gun for the first time. His findings confirmed Zimmers'. Several weeks later Sadunas appeared before the federal grand jury and testified to his previous error. Hanrahan, who was in charge of the state prosecution, learned of Sadunas' error in March. He discussed the corrected findings with the raiders and asked if they wanted to make further statements. Hanrahan and the raiders decided that the raiders should testify before the federal grand jury to relate their accounts of the incident. At the same time Hanrahan was considering dismissal of the state indictments.

According to Leonard, Hanrahan, the raiders, and other police officers eventually became "targets" of the federal grand jury investigation. Hanrahan was warned of this several weeks before he was requested to testify. Subsequently Leonard discussed the potential indictments with Johnson and informed him that "an arrangement" had been made between Hanrahan and him, whereby the raiders' testimony would be given to Hanrahan after they testified and that Hanrahan would drop the indictments against the survivors within thirty days. Leonard hoped that the

survivors would then testify before the federal grand jury. Shortly after this discussion, Johnson informed Treviranus of the "arrangement" and, on the basis of this conversation, Treviranus sent a teletype to FBI headquarters on April 8. The teletype stated that the dismissal of the local indictments would be based on the change in Sadunas' testimony.[18] Enclosed with the teletype was a draft of the first chapter of the grand jury report.

Groth and the other raiders began their testimony before the grand jury on the same day that Treviranus dispatched the teletype and the report. Groth was not requested to reveal the identity of his informant even though Leonard's assistants had requested this information from the State's Attorney's Office

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[18] The teletype stated:

AAG Jerris Leonard, Civil Rights Division, Department of Justice, at Chicago, advised SAC Marlin Johnson in strictest confidence that no indictments of police officers are planned in captioned matter. AAG Leonard has a firm commitment to meet with Edward V. Hanrahan, State's Attorney, Cook County, Illinois, within one week, whereupon, on basis of Federal District Court order Hanrahan will receive testimony of State's Attorney's Police before FGJ.

The above is based upon an agreement whereby Hanrahan

The above is based upon an agreement where Hanrahan will dismiss the local indictments against the BPP members. Hanrahan is to be given thirty days to dismiss the local indictment which will be based upon the change of testimony of John Sidunas [sic] of the Chicago Police Department Crime Lab.

Subsequent to this dismissal, BPP victims will then be subpoenaed before the FGJ for their testimony in this case.

and Groth in early February. At that time the State's Attorney's Office informed the assistants that "Jalovec was informed by a federal employee: [and] Groth may consider course of action if asked before the Grand Jury." The raiders refused to conform their testimony to the ballistics evidence and physical evidence shown them by the federal prosecutors prior to their appearance.

On May 4 Hanrahan appeared before the grand jury and testified that it was his intention to dismiss the indictments based on the revised Sadunas report. Four days after Hanrahan's appearance, the indictments against the survivors were dropped. The Government sought the seven survivors' testimony before the grand jury on May 11; however, the plaintiffs refused to testify. No indictments were returned and the federal grand jury was discharged on May 15.

In June 1970 a special prosecutor was appointed by the Chief Judge of the Criminal Division of the Circuit Court of Cook County to inquire into the police and Black Panther actions on December 4. A special state grand jury was convened in December 1970 which returned indictments against Hanrahan, Jalovec, Mulchrone, Meade, Sadunas, Koludrovic, Groth, Broderick, Carmody, Ciszewski, Corbett, Davis, Gorman, and Jones for conspiring to obstruct justice. On October 25, 1972 these defendants were found not guilty after a bench trial in the Criminal Court of Cook County.

These facts provide the basis for a determination of the legal issues concerning the directed verdicts. The plaintiffs' principal claim is that defendants conspired to deprive them of their civil rights.[19] The plaintiffs also assert claims against individual defendants for intentional and negligent violations of their rights. We now seek to outline generally the governing legal principles regarding civil conspiracies. This discussion will be followed by an analysis both of these standards and of the individualized claims as applied to the facts presented in the three stages of plaintiffs' case.

III. CONSPIRACY CLAIMS

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" *Rotermund* v. *United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973) (citation omitted). In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "[c]ircumstantial evidence may provide adequate proof of conspiracy." *Hoffman-LaRoche, Inc.* v. *Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). *See also United*

[19] Plaintiffs' conspiracy claims are based on 42 U.S.C. §§ 1983 and 1985(3).

States v. *Varelli*, 407 F.2d 735, 741-42 (7th Cir. 1969). Absent the testimony of a coconspirator, it is unlikely that direct evidence of a conspiratorial agreement will exist. Thus, the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609, 26 L.Ed. 2d 142 (1970).

A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." *Hoffman-LaRoche, Inc., supra*, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." *Id.*

Keeping these standards in mind, when we examine the evidence presented by both sides in this case in

the light most favorable to the plaintiffs, we conclude that the district court erred when it ruled that the plaintiffs had not established a prima facie case of conspiracy. Our analysis of the plaintiffs' case leads us to conclude that the plaintiffs did offer sufficient evidence to warrant a jury determination of whether a conspiracy existed. The fact that "all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it" does not justify judicial intrusion into the jury's role in determining whether a civil conspiracy existed. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01, 82 S.Ct. 1404, 1411, 8 L.Ed.2d 777 (1962). In such a situation, "it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" *Id.* (citation omitted). When a plaintiff alleges a conspiracy to violate civil rights, "[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Adickes, supra*, 398 U.S. at 176, 90 S.Ct. at 1618 (Black, J., concurring.)

We do wish, however, to make one observation about the nature of the conspiracy described by plaintiffs' evidence in this case.[20] We believe that plaintiffs have presented a prima facie case, not of a single

[20] It should be noted that when we refer to a conspiracy among defendants, we are not passing on the ultimate validity of plaintiffs' claims. We merely are commenting on plaintiffs' claims and evidence from which a jury reasonably could infer that a conspiracy or conspiracies existed.

conspiracy, but of two conspiracies designed to violate their rights in distinct ways. These conspiracies share many of the same participants who form "the common nucleus of separate conspiracies," *Varelli, supra*, 407 F.2d at 743, but they are not identical conspiracies. The first conspiracy, as we view the evidence, involves the state and federal defendants who participated in the pre-raid preparations and planning, and the raid itself. The second conspiracy, involving many of these same defendants, was the alleged coverup of evidence regarding the instigation, preparation and execution of the raid, and the post-raid legal harassment of the plaintiffs. These two conspiracies required entirely different kinds of activities, both legal and illegal, to achieve their ends. But more importantly, these two conspiracies had distinct objectives. The first conspiracy was designed to subvert and eliminate the Black Panther Party and its members, thereby suppressing both a potential source of unrest, turmoil, and even violence in the black community, and a vital, radical-black political organization. The second conspiracy harassed the survivors of the raid. Moreover, the post-raid conspiracy was intended to frustrate any redress the plaintiffs might seek and, more importantly, to conceal the true character of the pre-raid and raid activities of the defendants involved in the first conspiracy.

Reference to the law of criminal conspiracy suggests that this distinction between the substantive

criminal conspiracy and the subsequent concealment of the crime is important. The Supreme Court stated in *Grunewald* v. *United States*, 353 U.S. 391, 77 S. Ct. 963, 1 L.Ed.2d 931 (1957): "Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." *Id.* at 401-02, 77 S.Ct. at 972. Thus, in order to prove that acts of concealment constitute a part of the initial conspiracy, the prosecution must present "direct evidence [of] an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." *Id.* at 404, 77 S.Ct. at 973-74. Absent such evidence, the concealment is independent of the original conspiracy; the original conspiracy is not considered ongoing simply because concealment of the conspiracy continues. Thus, persons who participate in the concealment are not *ipso facto* participants in the original conspiracy.

These principles are instructive in analyzing the case presented by plaintiffs. Many of the state defendants are named in plaintiffs' complaint only for their participation in the post-raid coverup. Without direct proof that an agreement to conceal was part of the original conspiracy, these defendants should be liable only for damages arising out of the post-raid conspiracy. Defendants who are proved to have

participated in both the pre-raid and post-raid conspiracies are liable, of course, for damages arising out of both conspiracies.

We do not decide now that plaintiffs' case involves two conspiracies and that liability must be determined on the basis of that conclusion. Plaintiffs' discovery was hampered unduly by the trial court, *see infra*, pp. 639-642 and we cannot be certain that the plaintiffs, given full discovery, would be unable to prove that an agreement to conceal the facts concerning the preparation and execution of the raid existed as part of the original conspiracy. And, as we have noted before,

> [s]ince the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several. *United States* v. *Crosby*, 294 F.2d 928 (2d Cir. 1961); *Green* v. *United States*, 332 F.2d 788, 789 (5th Cir. 1964); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D.Ill. 1967).

Varelli, supra, 407 F.2d at 746. Thus, the trial court upon remand should provide jury instructions that will insure that the jury is aware of the alternatives of finding single or multiple conspiracies in the evidence presented by plaintiffs.

The defendants raise several questions about the legal sufficiency of plaintiffs' conspiracy claims which must be discussed. First, defendants contend that in order to have an adequate claim for relief under section 1983, a plaintiff must allege and prove both

a conspiracy and an actual deprivation of rights; mere proof of a conspiracy is insufficient to establish a section 1983 claim. This statement of the law is correct, *see Lesser* v. *Braniff Airways, Inc.*, 518 F.2d 538, 540 n.2 (7th Cir. 1975), but we do not see how this affects the viability of plaintiffs' claims in the instant case. Plaintiffs' prima facie case offers a number of constitutional deprivations to accompany their conspiracy allegations; clearly, the evidence would support a finding of injury which would constitute deprivation of constitutional rights. Thus, this requirement of a section 1983 claim has been satisfied.

The federal defendants also contend that section 1983 is inapplicable to them since its prohibitions are directed only against state actors. Yet when federal officials are engaged in a conspiracy with state officials to deprive constitutional rights, the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983. The Second Circuit has stated: "When the violation is the joint product of the exercise of a State power and of a non-State power then the test under the Fourteenth Amendment and § 1983 is whether the state or its officials played a 'significant' role in the result." *Kletschka* v. *Driver*, 411 F.2d 436, 449 (2d Cir. 1969) (citation omitted.) Our recent decision in *Askew* v. *Bloemker*, 548 F.2d 673 (7th Cir. 1976), is not to the contrary. In *Askew* the state officials did not play a significant role in the conspiracy:

"[B]oth the impetus for and the execution of" the conspiratorial plan derived from the federal officials. *Id.* at 678. Plaintiffs' evidence in the instant case indicates that the federal and state defendants shared in instigating and preparing for the raid. There can be no question that the state defendants "played a 'significant' role in the result." *Kletschka, supra*, 411 F.2d at 449.

Defendants also contend that plaintiffs have failed to state a claim under section 1985(3) because they have not proved that a racial or otherwise class-based, invidiously discriminatory animus was behind the conspirators' actions.[21] Proof of a class-based animus underlying the conspiracy is, of course, a requirement of a section 1985(3) claim. *Griffin* v. *Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). *Griffin* itself held that race was such a class-based animus, but did not establish what other types of class-based animi were sufficient to state a claim. The conspiracy alleged in this case, however, does not require an intensive analysis into either the meaning of *Griffin* or Congress' intent in drafting section 1985(3) to determine whether the class-based animus requirement was satisfied. The

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[21] The federal defendants make no contention that, because they are not state actors, they are not subject to the anti-discrimination provisions of the statute. Section 1985(3) clearly was intended to provide redress for victims of a conspiracy to violate civil rights whether or not the conspiracy was under color of state law. *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives.[22] And this is precisely the sort of conspiracy alleged by plaintiffs in this case.

A brief recital of some of the evidence presented by plaintiffs substantiates this conclusion.[23] The BPP was a black organization with a distinct political ideology and a variety of politically-oriented programs. FBI documents offered by plaintiffs demonstrate that certain FBI activities directed against the BPP transcended mere "law enforcement," and were designed to "neutralize" the BPP as a political voice on racial issues. Hanrahan testified that two of the principal

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[22] Discrimination on the basis of political beliefs or affiliations has been found to be actionable under section 1985(3). *See, e.g., Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); *Glasson* v. *City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). *See also Griffin, supra,* 403 U.S. at 102 n. 9, 91 S.Ct. 1790, n. 9; Comment, Private Conspiracies to Violate Civil Rights, 90 Harv.L.Rev. 1721, 1728 (1977) ("the legislative history behind section 1985(3) points unmistakably to the conclusion that discrimination on [the basis of political beliefs or affiliations] was intended to be actionable"). One of the foremost concerns of the drafters of the original section 1985(3) was discrimination against individuals whose political affiliations were imbued with racial implications. *See* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment,* 11 St. Louis U.L.J. 331 (1967).

[23] This evidence is examined in more detail. *See,* esp. *supra* at pp. 608-612.

goals of the unit his office assigned to investigate the BPP were to combat the anti-police propaganda the BPP had been disseminating in the black community and to mobilize support among blacks for police. And one of the purposes of the post-raid coverup was to prevent the development of widespread sympathy for the BPP cause which might have arisen out of a full disclosure of the facts surrounding the raid and the deaths of Clark and Hampton. Such purposes, if proven, bespeak of a class-based discriminatory animus which is at the heart of section 1985(3)'s prohibitions. There is no doubt that the plaintiffs have satisfied this requirement for proving a section 1985(3) claim.

Reviewing the facts presented by plaintiffs in light of these standards, we find that the trial court erred when it directed verdicts as to plaintiffs' conspiracy claims against Hanrahan, Jalovec, the raiders, and the federal defendants regarding their participation in the planning and execution of the raid. Plaintiffs presented considerable evidence, including FBI documents and express statements by Hanrahan, from which reasonable persons could conclude that these parties shared a "class-based or otherwise discriminatory" desire to undermine the BPP. These defendants also engaged in an extensive series of communications which could demonstrate to a reasonable person the existence of an agreement—either tacit or express—to act in concert to achieve their shared

objective.[24] Plaintiffs need not prove that the individual motives underlying a common, illegal desire to achieve the conspiratorial objective were identical. The essence of a conspiracy is the agreement, and a reasonable jury could find that the actions of these defendants demonstrate that they had agreed at least tacitly to work together to eliminate the BPP.

The state defendants argued that they never heard of a FBI counterintelligence program called "COINTELPRO" and thus they cannot be liable as coconspirators with the federal defendants. Similarly, the federal defendants contend that because they never met with any of the raiders—in fact, they had never heard of most of them—they cannot be part of a conspiracy which includes the raid on the BPP apartment. As we stated earlier, however, each participant in a conspiracy need not know the "exact limits of the illegal plan or the identity of all participants therein." *Hoffman-LaRoche, Inc., supra,* 447 F.2d at 875.

For example, the fact that Special Agent-in-Charge Johnson never spoke to Carmody (one of the raiders) does not preclude their being conspirators. Johnson closely supervised his subordinate FBI officials' activities vis-à-vis the BPP. These agents, in turn, had their contacts among the state defendants. The

[24] If the evidence were to demonstrate that the federal and state defendants merely agreed to help each other enforce the law and prevent violence by the BPP through lawful means, the agreement, of course, would not have violated plaintiffs' civil rights.

communications between Jalovec and Mitchell, in particular, were essential to the planning and successful execution of the raid. Without the information the federal defendants furnished the state defendants, the state defendants could not have acted in furtherance of the purpose which plaintiffs contend the state and federal defendants shared—inflicting injury to the BPP. The absence of a sole instigator who personally communicated with all the participants in the conspiracy and orchestrated each of their actions does not preclude a jury from concluding that a conspiracy existed. Plaintiffs presented sufficient evidence from which a reasonable person could find that all the defendants named in the initial conspiracy performed discreet functions in concert to further a common plan—the raid.

Liability for civil conspiracy requires proof of more than an agreement among conspirators; a plaintiff must show that an actual deprivation of his rights resulted from the conspiracy. *See supra,* p. 622. The raid and the injuries suffered by plaintiffs as a result of the raid reasonably could be found to constitute this actual deprivation of rights. Thus, plaintiffs have established a prima facie case under sections 1983 and 1985(3) for civil liability: a conspiracy to violate their civil rights and actual deprivation of those rights arising from the implementation of the conspiratorial plan.

IV. CLAIMS OF INDIVIDUAL LIABILITY FOR ACTS BEFORE AND DURING THE RAID

As an alternative to the conspiracy allegations, plaintiffs assert that these defendants are subject to individual liability under section 1983 or directly under the Constitution. The gist of their claims is that these defendants are liable for the intentional and negligent deprivation of rights which occurred during the raid.[25]

A. *Shooters*

Plaintiffs seek recovery against the shooters on the ground that these defendants, acting under color of state law, made an illegal entry into the West Mon-

[25] Defendants urge that plaintiffs be denied relief on the ground that negligent conduct is not cognizable under section 1983. We are not persuaded by this argument. Defendants are correct that "mere negligence" is not actionable under 42 U.S.C. § 1983. *Bonner* v. *Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978). In *Jamison* v. *McCurrie*, 565 F.2d 483, 486 (7th Cir. 1977), Chief Judge Fairchild articulated the standard for a constitutional cause of action: "The plaintiff must show that [the police officers'] misbehavior was either intentional or in reckless disregard of his constitutional rights," citing *Bonner* v. *Coughlin, supra*. The evidence offered by plaintiffs, however, viewed in the light most favorable to them, satisfies this test. Plaintiffs' case rests on evidence of excessive force, assault, battery, and wrongful death which a jury could conclude constituted reckless disregard of plaintiffs' civil rights in violation of 42 U.S.C. § 1983. *See Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1960); *Clark* v. *Ziedonis*, 513 F.2d 79, 80 n.1 (7th Cir. 1975).

roe Street apartment and used deadly and excessive force in addition to committing assault, battery, and other abusive acts on its occupants. Our discussion of the facts concerning the propriety of the search warrant which defendants assert justified their entry into the apartment is found in our analysis of Groth's refusal to identify the informant he used to support the affidavit for the warrant. *See infra*, pp. 635-639. Even if the officers were acting pursuant to a search warrant validly issued, the question remains for the jury's determination whether the force used by the raiders within the apartment was reasonable under the circumstances. The officers had a right to use some degree of force in executing the warrant and defending themselves. As noted in *Terry* v. *Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968), "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." The record is replete with factual disputes regarding the activities of the shooters on the morning of December 4. For example, it reasonably could be inferred that Mark Clark's gun fired during his struggle with Groth rather than when the police officers first broke through the door. Additionally, plaintiffs testified at trial that none of the survivors fired a gun during the raid. And Zimmers' expert testimony corroborated these assertions. Numerous other questions of fact are present in the record, including the issue of whether Fred Hampton was drugged at the time of the raid and

shot deliberately after Johnson, Truelock, and Bell had left the bedroom.

Assessing the credibility of witnesses and weighing the evidence are matters within the sole province of the jury. In granting the directed verdicts, the trial judge repeatedly usurped this function. For example, the judge concluded in his Summary that "Brenda Harris fired a shot which went past Groth's shoulder." This finding was made in disregard of Harris' testimony to the contrary and the physical evidence offered at trial. Additionally, the trial court ignored the testimony of Johnson and Truelock and determined that "the evidence is conclusive that [Hampton] was shot three times and that he was dead when Deborah Johnson and Louis Truelock left the bedroom." The court also weighed the conflicting evidence of the experts and found that the evidence introduced by plaintiffs' toxologist, Dr. Eleanor Berman, was "in error."

In light of the evidence presented by plaintiffs, the question of the seven shooting police officers' liability should have been submitted to the jury. Accordingly, we reverse the verdicts directed in favor of these police officers on the individual counts.

B. *Nonshooters*

In addition to their conspiracy allegations, plaintiffs have presented a prima facie case under section 1983 against the nonshooters on the basis of their nonfeasance at the BPP apartment. This court previously imposed liability in damages for nonfeasance

in *Byrd* v. *Brishke*, 466 F.2d 6 (7th Cir. 1972). The facts in *Byrd* are strikingly similar to those alleged in the case at bar. In *Byrd* Chicago police officers failed to deter other officers who, in their presence, beat the plaintiff with fists and clubs. Holding that purposeful nonfeasance of such magnitude could serve as the basis of tort liability under section 1983, we stated that "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence." 466 F.2d at 11.

Plaintiffs in this case assert that the nonshooters are liable, under the rule in *Byrd*, for failing to assist or protect the wounded occupants. The officers entered the apartment immediately after the firing ceased and plaintiffs testified that the nonshooters were present during the beatings and abuse which they said followed the shootout. In light of our decision in *Byrd*, the fact if found by a jury determination that these men did not personally participate in the abuse, but instead callously chose to watch, would not preclude their liability. Accordingly, this issue should have been submitted to the jury. We hold that the directed verdicts in favor of the nonshooters regarding their activities in the raid were improperly granted by the trial court.*

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* Judge Pell states in dissent that the directed verdicts in favor of the nonshooters were proper because there is "no basis [in the record] for even an inference that the nonshooters were inside when any occupant of the apartment

C. *Hanrahan and Jalovec*

Plaintiffs contend that the alleged failure of Hanrahan and Jalovec to supervise properly the officers attached to the SPU creates a cause of action based on section 1983. We agree. In *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th Cir. 1969), we held that supervisory personnel are proper party-defendants to a section 1983 action

> whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior.

Id. at 1086. *See also Sims* v. *Adams*, 537 F.2d 829, 831 (5th Cir. 1976). Plaintiffs have established a prima facie case against Hanrahan and Jalovec on the basis of their roles as supervisors of the police officers who participated in the raid. They approved Groth's selection of men and weapons carried on the raid. Additionally, they approved of the early morning timing of the execution of the search warrant. It was for the jury to determine whether the consequences of these actions were foreseeable. We believe that the trial court improperly directed verdicts in favor of these defendants on the nonconspiracy counts.

D. *Federal Defendants*

Finally, we fail to see the distinction which plaintiffs make between "joint activity" under section 1983 and conspiracy under sections 1985(3) and 1983 regarding the federal defendants' liability for damages resulting from the raid. The same legal standards apply to each form of liability. As stated by Prosser,

> joint tortfeasor liability arises when persons "who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit are equally liable with him." Prosser, Torts (4th ed. 1971) p. 292.

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was allegedly mistreated, and certainly not to support the inference suggested in Judge Swygert's opinion that they 'callously chose to watch.' " *Infra*, p. 658.

The record demonstrates that the dissent's position is incorrect. Louis Truelock testified before the state grand jury that there were "fifteen or twenty officers in the kitchen," some in uniform and some in plainclothes, when the firing ceased and Groth ordered that the bodies be brought into the kitchen. Plaintiffs' Exhibit LT #7, pp. 27-28. (The shooters wore black on the raid; nonshooters wore police uniforms.) Additionally, testimony of several of the nonshooters themselves establishes that they were inside the apartment before the survivors were taken away. Officer Kelly testified at the Coroner's inquest that he entered the apartment in the midst of the firing. Plaintiffs' Exhibit 417, p. 109. *See also* Federal Grand Jury testimony, Plaintiffs' Exhibit 574B, p. 152. And Officer Marusich testified at the Coroner's inquest that he entered the apartment "a couple of minutes" after the last shot was fired. Plaintiffs' Exhibit 421, p. 1236.

This evidence demonstrates that at least some, if not all, nonshooters were in the apartment at the time the occupants allegedly were being abused. The question whether nonshooters are liable under section 1983 for purposeful nonfeasance, under the rule of *Byrd*, is one for the jury to determine.

The evidence which plaintiffs presented to support their nonconspiracy theory against these defendants is identical to that which was aimed at establishing their conspiracy claims. Accordingly, although we fail to see the need to allege this redundant theory of recovery, we hold that plaintiffs have presented sufficient evidence to support their joint activity claims.[26]

V. CLAIMS OF LIABILITY FOR POST-RAID ACTS

On the basis of the post-trial facts, plaintiffs claim that defendants conspired to cause the false arrest, imprisonment, and prosecution of the survivors of the raid. All defendants are named as participants in the post-raid conspiracy. As a further result of the conspiracy, plaintiffs allege that the Cook County criminal prosecution against them was prolonged to

[26] In Count 4 of their complaint, plaintiffs allege under section 1986 that Hanrahan, Jalovec, the raiders, and the federal defendants neglected to prevent the wrongs perpetrated in violation of section 1985(3). Section 1986 states in part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

On the basis of our examination of the evidence supporting plaintiffs' conspiracy claim, we conclude that plaintiffs established a prima facie case of section 1986 liability.

May 8, 1970 and that they incurred unnecessary legal expenses and suffered mental anguish and injury to their reputations. Relief is sought under sections 1983 and 1985(3).

A. *Hanrahan, Jalovec, the raiders, and the federal defendants*

We hold that plaintiffs have presented sufficient evidence to establish a prima facie case that Hanrahan, Jalovec, the raiders, and the federal defendants participated in a post-raid conspiracy to harass the survivors of the raid and to conceal the facts surrounding the raid, thereby injuring plaintiffs.[27]

On the morning of December 4 several raiders met with Hanrahan and Jalovec to discuss the raid. Mitchell met with Groth and Jalovec the same morning and left immediately prior to Hanrahan's first press conference. From these conversations emerged an allegedly distorted, if not false, account of the raid which justified the officers' actions. In the days that followed, Hanrahan instituted a promotional campaign. Despite their awareness of conflicting stories, Hanrahan, Jalovec, and the raiders continued to circulate reports to justify the continuation of plaintiffs' detention. And it was the raiders' testimony which provided much of the basis for the indictments Hanrahan brought against the survivors.

The irregularities in the series of official investigations into the raid also constitute evidence from

[27] We read Counts 6 and 8 of plaintiffs' complaint as describing the post-raid conspiracy.

which there could be found a concerted effort to suppress facts about the planning and execution of the raid and to justify the charges filed against the survivors. For example, at the internal investigation (IID) conducted by the Chicago Police Department, customary procedures were abandoned. Detailed statements normally taken were never obtained. Jalovec and Sorosky, present at Hanrahan's direction, met with the raiders immediately before the raiders supplied their previously prepared, uniform answers to predetermined questions. At the same time, a ballistics report, compiled under pressure from the State's Attorney's Office and several of the raiders, was issued by Sadunas of the Chicago Police Department. Despite its lack of completeness, the report immediately was used to support the raiders' account of the raid, the IID findings, and the Cook County indictments.

The concerted effort to suppress facts is further evidenced by the obstruction of the federal grand jury investigation, caused by the failure of the federal defendants to turn over materials sought by the grand jury. The evidence shows that a jury could find that Johnson's testimony before the grand jury was false and misleading and concealed the involvement of FBI headquarters and the roles of Piper, Mitchell, and O'Neal in the planning of the raid. Additionally, Johnson participated in the arrangement between Hanrahan and Leonard whereby Leonard agreed not to obtain indictments against any state officials for their actions with regard to the raid in

exchange for the dismissal of the state indictments against the survivors. And during the pretrial discovery in this suit, the federal defendants continued to engage in dilatory and obstructive tactics to conceal evidence of their involvement in the planning of the raid. *See infra*, pp. 639-642.

A jury reasonably could infer that a conspiracy existed to conceal the facts of the raid and to continue an unfounded prosecution against plaintiffs.[28]

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[28] In Count 7 plaintiffs charge Hanrahan, Jalovec, the raiders, and the federal defendants (except O'Neal) with failing to prevent the post-raid conspiracy in violation of section 1986. Plaintiffs have presented sufficient evidence to establish a prima facie case on this theory of liability. Additionally, in Count 11 of their complaint, plaintiffs allege that Hanrahan, Jalovec, Groth, O'Neal, Mitchell, Johnson, and Piper conspired to obstruct justice in violation of 42 U.S.C. § 1985(2). Section 1985(2) states:

> . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws. . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

We conclude, on the basis of our review of the evidence supporting plaintiffs' conspiracy claims, that plaintiffs established a prima facie case of a section 1985(2) violation.

B. Purtell, Koludrovic, and Sadunas

We hold that plaintiffs' evidence does not present a prima facie case as to Purtell and Koludrovic. Purtell was the director of the Chicago Crime Laboratory and the supervisor of Koludrovic and Sadunas. There is, however, no evidence that he participated in any agreement or effort to distort the evidence found inside the apartment on December 4. Similarly, plaintiffs' case against Koludrovic is insufficient. In his official report he stated that more than one shot was fired at the raiders as they entered the apartment and he reiterated this conclusion at the Coroner's inquest. There was, however, no evidence of an agreement, either tacit or express, between him and any other defendant to conceal or distort facts about the raid. His task at the apartment was made especially difficult by the raiders' disruptive search prior to his arrival and, if his examination of the premises was less than thorough, the evidence suggests that this was the result, at worst, of negligent rather than intentional conduct.

There is, however, evidence—and reasonable inferences—pointing to Sadunas' participation in the post-raid conspiracy. Sadunas' initial ballistics test was incomplete; he compared spent shotshells from the apartment only with the weapons seized at the apartment and ignored the weapons which had been used by the raiders. His examination resulted in a crucial misidentification which would have remained uncorrected absent Zimmers' subsequent tests and conclu-

sions. When he learned of Zimmers' findings, Sadunas retested the shells comparing them with all the weapons—including those of the raiders. After these tests, Sadunas readily admitted his mistake. Given this set of events, we think that the determination whether his misidentification was the result of professional incompetence or conspiratorial conduct should have been left for the jury.

C. Participants in the IID Investigation

Meade and Mulchrone, through their participation in the IID investigation, were not involved in the dimension of the conspiracy which resulted in the imprisonment and prosecution of the survivors without legal basis; rather, their actions reasonably could have been found to have encouraged the continuation of the unfounded prosecution by suppressing the development of inconsistent evidence against the raiders, Hanrahan, and Jalovec. Police Superintendent Conlisk initiated the investigation at Hanrahan's request and ordered Mulchrone to supervise the proceedings. Mulchrone admitted that the purpose of the investigation was not to test the veracity of the raiders' stories, but to prevent the emergence of contradictory testimony. Meade designed the perfunctory questions and supplied the uniform answers for the inquiry. Accordingly, the facts were sufficient to include Meade and Mulchrone in a post-raid conspiracy charge.

Plaintiffs did not present a prima facie case for conspiratorial liability against Ervanian, Kukowinski,

Sorosky, and Meltreger. A reasonable jury might find, however, that these defendants violated 42 U.S.C. § 1986. Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action.

Ervanian and Kukowinski, who normally conducted IID investigations, were replaced for the Hampton investigation. They were aware of and later acknowledged the irregular character of the investigation. Although they were not active participants in the "whitewash," they took no steps to correct it. Similarly, plaintiffs presented no evidence that Assistant State's Attorneys Sorosky and Meltreger participated in the preparation for the perfunctory interrogation of the raiders. Prior to this examination, however, they were shown the questions and answers which had been prepared for the raiders, and Sorosky, with Jalovec, met with the raiders immediately before their interviews. And, like Ervanian and Kukowinski, Sorosky and Meltreger made no attempt to prevent

the irregular conduct of the investigation. Thus, although these defendants could not be liable on the basis of the existing record under plaintiffs' conspiracy claims, there is sufficient evidence to support the claims brought against them pursuant to 42 U.S.C. § 1986.

Plaintiffs also contend, in addition to their conspiracy claims, that there was no legal basis for the arrest and imprisonment of the survivors of the raid and therefore that Hanrahan, Jalovec, and the raiders are liable under section 1983 for the intentional deprivation of civil rights by false imprisonment. See *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961); *Joseph* v. *Rowlen*, 402 F.2d 367 (7th Cir. 1968). Several survivors were jailed on the basis of the officers' sworn complaints that the occupants committed attempted murder and aggravated battery against the raiders. Hanrahan and Jalovec authorized the filing of these charges. As a result of the charges, the high bond set at the request of the State's Attorney's Office, and the denial of plaintiffs' demand for a preliminary hearing, these survivors were imprisoned until December 21.

Plaintiffs' claim, of course, hinges on the question whether defendants were acting with probable cause when they filed charges against the survivors. *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Banish* v. *Locks*, 414 F.2d 638 (7th Cir. 1969). See also pp. 631-635 *infra*. The question of whether the facts known to a defendant amounted to probable cause should be determined by the court

when there is no disagreement as to the facts or circumstances surrounding the detention. *Banish* v. *Locks*, *supra*, 414 F.2d at 641. In light of the numerous disputes regarding the facts defendants knew or reasonably believed, however, the trial court should have submitted the issue of probable cause to the jury.

Plaintiffs argue that all defendants (except O'Neal) are liable individually under section 1983 for malicious prosecution. An action for malicious prosecution may be brought under section 1983 if, acting under color of state law, the defendant has subjected the plaintiff to a deprivation of constitutional magnitude. *Hampton I*, *supra*; *Banish* v. *Locks*, *supra*; *Nesmith* v. *Alford*, 318 F.2d 110, 126 (5th Cir. 1963). Plaintiffs contend that the raiders, Hanrahan, and Jalovec instituted an unfounded prosecution and that they, along with the other defendants, supported its continuation. Relief is sought for the constitutional deprivations and injuries arising from this prosecution.

The absence of probable cause is an essential element of an action for malicious prosecution. *Banish* v. *Locks*, *supra*, 414 F.2d at 640. Under the general tort principles of malicious prosecution,

> The defendant may be liable *either for initiating or for continuing a criminal prosecution* without probable cause. But he cannot be held responsible unless he takes some active part in instigating or encouraging the prosecution. He is not liable merely because his approval or silent acquiescence in the acts of another, nor for appearing as a witness against the accused, even though his testimony is perjured. . . . On the other hand, if he advises or assists another person to begin the proceeding, ratifies it when it is begun in his behalf, or takes any active part in directing or aiding the conduct of the case, he will be responsible (emphasis added).

Prosser, Torts (4th ed. 1971) pp. 836-37.

Plaintiffs referred to essentially the same evidence to support their individual malicious prosecution claims as they did to substantiate their conspiracy claims regarding malicious prosecution. We reach the same conclusion here as we did earlier. We hold that plaintiffs failed to establish a prima facie case against defendants Purtell, Koludrovic, Kukowinski, Ervanian, Sorosky, and Meltreger. The malicious prosecution claims against the remaining defendants should have been submitted to the jury and, accordingly, we reverse the trial court's directed verdicts as to these defendants.[29]

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[29] In summary, a prima facie case has been made out against defendants as follows:

Counts 1-4: Hanrahan, Jalovec, the raiders, and the federal defendants.
Count 5: Hanrahan, Jalovec, and the raiders.
Count 6: Hanrahan, Jalovec, and the raiders.
Count 7: Hanrahan, Jalovec, the raiders, Johnson, Piper, and Mitchell.
Count 8: Hanrahan, Jalovec, the raiders, Johnson, Piper, Mitchell, Sadunas, Meade, and Mulchrone.
Count 9: Hanrahan, Jalovec, the raiders, Johnson, Piper, Mitchell, Sadunas, Meade, and Mulchrone.

VI. CLAIMS OF IMMUNITY

The Supreme Court stated many years ago that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). When Congress adopted section 1983, it decided that "every person" who, under color of state law, deprived another of a constitutional right, privilege, or immunity was liable to the victim for damages. Since then, however, the courts have recognized certain exceptions to the unrestricted language of this provision and have afforded immunity to persons acting in specified official capacities.

Both the state and federal defendants claim that they enjoy official immunity for their actions in connection with the raid on the apartment on West Monroe Street. The entreaties of public officials for immunity for their official wrongdoing, however, should be treated with circumspection. *Grow* v. *Fisher*, 523 F.2d 875 (7th Cir. 1975). We should be hesitant to expand the scope of official activity which, from the perspective of a victim seeking civil redress, stands beyond the constraints of the Constitution. *See*

Count 10: Hanrahan, Jalovec, the raiders, Johnson, Piper, Mitchell, Sadunas, Meade, Mulchrone, Ervanian, Kukowinski, Sorosky, and Meltreger.

Count 11: Hanrahan, Jalovec, Groth, and the federal defendants.

Count 14: Hanrahan, Jalovec, the raiders, and the federal defendants.

generally Butz v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). For us to hold that all of the actions of the defendants in this case should be immune from liability as a matter of law would require us to expand radically the parameters which the Supreme Court has set for the doctrine of official immunity. This we are unwilling to do.

A. State Defendants: Absolute Immunity

State defendants Hanrahan, Jalovec, Meltreger, and Sorosky (the Cook County State's Attorney and three of his assistants) contend that they cannot be found liable for the damages alleged by plaintiffs because they enjoy absolute immunity for their actions under the rule of *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The other state defendants claim a qualified immunity. *See Procunier* v. *Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). We hold that the four state prosecutors have absolute immunity from section 1983 liability for some of their post-raid activities. Most of their allegedly illegal actions, however—including all of their pre-raid activities—must be tested by the standards of qualified immunity.

The Supreme Court in *Imbler* did not hold that all official actions of a state prosecutor are absolutely immune from section 1983 liability. *Imbler* held only that a prosecutor has absolute immunity "in

initiating a prosecution and in presenting the State's case." *Imbler, supra,* 424 U.S. at 431, 96 S.Ct. at 995. *See Briggs* v. *Goodwin,* 186 U.S.App.D.C. 179, 569 F.2d 10 (1977), *cert. denied,* 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978) (prosecutor's immunity limited to his "advocacy" functions). The Court left standing circuit decisions which, by focusing on "the functional nature of the activities" rather than the "status" of the prosecutor, held that certain official actions by state prosecutors are entitled only to qualified immunity. *Imbler, supra,* 424 U.S. at 430, 96 S.Ct. at 995. *See, e.g., Guerro* v. *Mulhearn,* 498 F.2d 1249, 1256 (1st Cir. 1974); *Hampton* v. *City of Chicago,* 484 F.2d 602, 608-09 (7th Cir. 1973); *Robichaud* v. *Ronan,* 351 F.2d 533, 536-37 (9th Cir. 1965). These cases clearly indicate that when a state prosecutor is performing investigative rather than advocacy functions, he is not wrapped with absolute immunity.[30] *See Briggs, supra,* 569 F.2d at 16-17.

In *Hampton I, supra,* we examined the claim of Hanrahan and Jalovec to absolute immunity for their pre-raid conduct. We concluded that their

> alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under [their] direction.

Hampton I, supra, 484 F.2d at 609. Neither *Imbler, supra,* 424 U.S. at 430, 96 S.Ct. 984, nor our fuller consideration of the issue aided by the evidence produced at trial alters that conclusion.

More difficult questions are presented by the claims of the defendants from the State's Attorney's Office —Hanrahan, Jalovec, Meltreger, and Sorosky—to absolute immunity with respect to their post-raid conduct. Resolution of these claims requires a close analysis of the nature of the defendants' activities. We hold that while some of their actions fall within the ambit of *Imbler's* protection, others do not.

Hanrahan's decision to file charges against the survivors of the raid, his presentation of evidence before the state grand jury, and his deal with Assistant Attorney General Leonard to drop the state charges all comprise part of his "quasi-judicial" duties as state prosecutor—"initiating a prosecution and . . . presenting the State's case . . . ." *Imbler, supra,* 424 U.S. at 431, 96 S.Ct. at 995; *Butz, supra,* 438 U.S. at 512-517, 98 S.Ct. at 2914-2916. Thus, Hanrahan and any Assistant State's Attorney who aided him in these phases of his post-raid activity are absolutely immune from civil liability for their conduct.

Other post-raid actions of these defendants, however, do not warrant absolute immunity. To the extent that plaintiffs can both show injuries arising from this conduct and demonstrate that the defend-

[30] Our recent decision in *Daniels* v. *Kieser,* 586 F.2d 64 (7th Cir. 1978), is not to the contrary. In *Daniels* we held that the prosecutor's actions were within his "quasi-judicial" functions and, for that reason, were absolutely immune from liability. *Id.* at 68-69.

ants' actions were illegal and unprotected by their qualified immunity, the defendants will be liable for damages. In particular, the State's Attorney's Office's generation of post-raid publicity, which may have caused pre-trial prejudice to the plaintiffs and encouraged the alleged coverup of the true facts of the raid, is not protected by absolute immunity. *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), said that a federal official who, even maliciously, issues a false and damaging publication the issuance of which is within the parameters of his official duties, is absolutely immune from liability for libel. However, the Supreme Court this term noted that

> a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.
>
> *Barr* did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.

Butz, supra, 438 U.S. at 482, 98 S.Ct. at 290. Thus, *Barr* does not control in this case where the state officials' post-raid public relations activity allegedly violated specific statutory and constitutional guarantees.

Further, the Supreme Court's recent decisions in *Butz* and *Imbler* do not suggest that a state prosecutor's publicity actions should be absolutely immune from civil liability. In *Butz*, one of the actions plaintiff complained of was the defendants' issuance of a deceptive press release. *Butz, supra*, 438 U.S. at 482, 98 S.Ct. at 2898. And the language in *Butz* suggests that the defendants were absolutely immune for most of their conduct vis-à-vis the plaintiff. However, "the task of applying the foregoing principles" to the particular claims against the defendants in *Butz* was left to the district court on remand. *Id.* 438 U.S. at 517, 98 S.Ct. at 2916. A close reading of *Butz* suggests that the boundaries of the absolute immunity afforded prosecutors in administrative proceedings do not encompass their publicity campaigns. The Court said that "the decision to initiate or continue a proceeding" and "the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact" are cloaked in absolute immunity but made no intimation that a prosecutor's issuance of a press release warrants the same treatment. *Id.* 438 U.S. at 516-517, 98 S.Ct. at 2916. Significantly, one of the safeguards the *Butz* Court persistently referred to in justifying its extension of absolute immunity to certain "quasi-judicial" actions of administrative prosecutors—the scrutiny a prosecutor's discretionary decisions receive in the adjudicatory process, *id.* 438 U.S. at 516-517, 98 S.Ct. at 2916—is absent in the publicity context.

Imbler's imposition of absolute immunity on the "judicial phase" of a prosecutor's duties likewise does not protect a prosecutor's publicity campaigns. *Imbler's* justification for granting absolute immunity to

all of a state prosecutor's "quasi-judicial" activities has been sharply criticized, *see, e.g., Imbler, supra,* 424 U.S. at 432-47, 96 S.Ct. 984 (White, J., concurring); Developments in the Law: Section 1983, 90 Harv.L.Rev. 1133, at 1200, 1204 (1977), but even on its own terms the justification does not extend to a prosecutor's decision to publicize his actions or actions taken by others in the community. Neither the prosecutor's judgment "in deciding which suits to bring and in conducting them in court," *Imbler, supra,* 424 U.S. at 424-25, 96 S.Ct. at 992, nor "the functioning of the criminal justice system," *id.* at 426-27, 96 S.Ct. at 993, would be undermined by maintaining the exposure of a prosecutor's public relations decisions to section 1983 liability, subject only to a qualified immunity. There is no compelling justification for extending absolute immunity to these decisions. Thus, we hold that Hanrahan's post-raid press conferences and the participation of Hanrahan and Jalovec in the exclusive interview with the *Chicago Tribune* and in the CBS-TV reenactment of the raid are protected only by a qualified immunity.

State defendants Jalovec, Sorosky, and Meltreger contend that they are absolutely immune from liability for their participation in the IID investigation. In our earlier review of Sorosky's and Meltreger's claims for absolute immunity, *Hampton I, supra,* we observed that the plaintiffs essentially alleged that these defendants had engaged in "the deliberate preparation of perjured testimony." *Id.*

at 609 n. 9.[31] We concluded that such conduct "clearly exceeded the scope of their quasi-judicial immunity." *Id.*

Since our decision in *Hampton I,* however, the Supreme Court rendered its decision in *Imbler* v. *Pachtman, supra.* Applying that decision, we recently held that prosecutors who with local police allegedly destroyed and falsified a line-up report and police tapes of incoming phone calls, were protected by the doctrine of absolute immunity. *Heidelberg* v. *Hammer,* 577 F.2d 429, 432 (7th Cir. 1978). The actions of Jalovec, Sorosky, and Meltreger at the IID investigation constituted failure to prevent conduct which was essentially indistinguishable from the prosecutorial activity encapsulated in the allegations in *Heidelberg.* Thus, we are compelled to conclude that Jalovec, Sorosky, and Meltreger are absolutely immune from liability for their actions at this hearing.

B. *Federal Defendants: Absolute Immunity*

The federal defendants, Johnson, Piper, Mitchell, and O'Neal, seek absolute or at least qualified official immunity for their allegedly illegal actions. They

[31] Today we hold that plaintiffs did not present sufficient evidence against Sorosky and Meltreger to warrant submission of the conspiracy claims against them to a jury. We do hold, however, that there was sufficient evidence supporting the section 1986 claims against them. While *Imbler* expressly discusses only section 1983, its reasoning applies to the 1871 civil rights statutes generally, *see Tenney* v. *Brandhove,* 341 U.S. 367, 369, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and thus should be applied to claims brought against prosecutors pursuant to section 1986.

rely on *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), as the basis for their claim to absolute immunity. But as we noted earlier, *supra* at p. 632, the Supreme Court recently explained that *Barr* does not afford protection to a federal official who has exceeded an express statutory or constitutional limitation on his authority. "[A] federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz, supra*, 438 U.S. at 489, 98 S.Ct. at 2902. Plaintiffs have presented considerable evidence to support their allegations that the federal defendants violated both constitutional and statutory limitations on their authority. Thus, the absolute immunity granted to federal officials pursuant to *Barr* does not apply to the federal defendants in this case.

Butz made clear that federal officials should receive no more judicial protection from liability for violating an individual's civil rights than their state counterparts. The Court stated:

> . . . in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983.

Id. 438 U.S. at 500, 98 S.Ct. at 2907.[32] It must be

[32] The *Butz* Court held that a federal official's exposure to civil liability under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), should be the same as a state official's exposure under section 1983. In the instant case, the plaintiffs not only are seeking damages from the federal defendants under *Bivens*, but also are alleging that the federal defendants, by conspiring with state officials to violate the plaintiffs' civil rights, violated section 1983. We see no reason, given the Court's reasoning in *Butz*, to give different official immunity treatment to federal violators of section 1983 than to state violators.

remembered, though, that while *Butz* concluded that federal officials exercising discretion generally are protected only by qualified immunity for their official actions, there are "exceptional situations" where "absolute immunity is essential for the conduct of public business." *Id.* 438 U.S. at 507, 98 S.Ct. at 2911. The situation of these federal defendants is not exceptional. They were, according to their own characterizations, law enforcement officials investigating potential wrongdoing. It is a firmly established rule that such activity by state law enforcement officials warrants only qualified immunity. *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.E.2d 288 (1967). And as the Supreme Court observed in *Butz*: "We see no sense . . . in distinguishing between state and federal police participating in the same investigation." *Butz, supra*, 438 U.S. at 500, 98 S.Ct. at 2908. Thus we conclude that the federal defendants in this case are not absolutely immune from liability for their actions and are protected only by the doctrine of qualified official immunity.

C. *Qualified Immunity*

The test for applying the doctrine of qualified immunity to a given defendant was most recently

restated by the Supreme Court in *Procunier* v. *Navarette*, 434 U.S. 555, 98 S.Ct. 855, 54 L.Ed.2d 24 (1978). *See also Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Court in *Procunier* described the two circumstances in which an official ordinarily insulated by qualified immunity would be exposed to section 1983 liability. First, the Court said:

> [T]he immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm.

Procunier, *supra*, 434 U.S. at 562, 98 S.Ct. at 860. *See Wood*, *supra*, 420 U.S. at 322, 95 S.Ct. 992. Alternatively, the Court stated that qualified immunity is not available

> where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct. *See* Restatement (Second) of Torts § 8A [1965].

Procunier, *supra*, 434 U.S. at 566, 98 S.Ct. at 862.

The allegations of plaintiffs in this case clearly complain of official misconduct which is outside the

ambit of the doctrine of qualified immunity. If plaintiffs prove their case against the defendants, the doctrine of qualified immunity will not thwart recovery of damages. The rights which plaintiffs contend that defendants have violated are clearly established. Plaintiffs have presented evidence which could suggest that the defendants—both as part of a conspiracy and individually—violated, among others, their clearly established First,[33] Fourth,[34] and Fourteenth Amendment rights.[35] And defendants have not shown as a matter of law that they should not have known either that these rights existed or that their alleged conduct violated them. *See Procunier*, *supra*, 434 U.S. at 562, 98 S.Ct. 855. Thus, we hold that the question whether defendants reasonably believed that their conduct did not violate a constitutional right, given the evidence presented at trial, should have been submitted to the jury.[36]

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[33] The suppression of plaintiffs' political speech through harassment, intimidation, and subversion—part of plaintiffs' case against the defendants—would constitute violation of a clearly established right.

[34] An illegal entry based on a falsified warrant is a violation of clearly established Fourth Amendment protections.

[35] Killing and wounding the inhabitants of an apartment without cause, placing the survivors in jail, and subjecting them to trial based on spurious charges is a patently obvious violation of an individual's right not to be deprived of life, liberty, or property without due process of law.

[36] There is no need to examine the second branch of the doctrine to determine whether the defendants acted with the requisite intent to deprive them of the benefits of their qualified immunity. Either branch of the doctrine independently

In summary, Hanrahan's decision to file criminal charges against the survivors, his presentation of evidence to the grand jury, and his eventual decision to drop these charges, are absolutely immune from civil liability under the *Imbler* doctrine. Similarly, the activities of Jalovec, Sorosky, and Meltreger at the IID hearing are absolutely immune. All the remaining activities of the defendants in this controversy are protected only by a qualified immunity, and a determination of whether their actions satisfy the conditions for this defense must await the retrial.

VII. VALIDITY OF THE SEARCH WARRANT

The police officers who went to 2337 West Monroe Street on December 4, 1969 were acting pursuant to a warrant issued by a Cook County circuit judge. The warrant was supported by an affidavit in which Groth stated that a reliable informant had provided information that illegal weapons were present in the Monroe Street apartment. Groth's complaint for the search warrant further stated that Jalovec told Groth that he too had a conversation with a reliable informant who told him that illegal weapons were stored in the apartment.

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can deprive a defendant of the immunity. We note, however, that plaintiffs in the instant case have presented sufficient evidence to require a trial court to submit the issue of the defendants' intent to a jury if it were necessary to determine whether the defendants could avail themselves of qualified immunity.

The plaintiffs seek disclosure of the identity of Groth's informant.[37] The plaintiffs contend that only disclosure of the identity of Groth's informant—if, in fact, one exists—will permit a full inquiry into whether probable cause existed for the issuance of the warrant. If Groth did not have an informant, or his informant did not provide the information contained in the affidavit, or the informant was unreliable, the validity of the warrant would be in jeopardy and plaintiffs' Fourth Amendment violation claims would be strengthened.[38] Further, plaintiffs contend that the search warrant was merely a pretext for the raid and that misrepresentations in the affidavit would constitute evidence of a conspiracy to violate the civil rights of the plaintiffs. If Groth did not receive the information contained in his affidavit

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[37] The identity of Jalovec's "informant" has already been disclosed. In fact, Jalovec did not have an informant who saw the weapons in the apartment. Instead, Jalovec was told about the weapons by Mitchell, who in turn had learned about the weapons from his informant, O'Neal. O'Neal's identity was disclosed several years after these events by the United States Attorney for the Northern District of Illinois in an unrelated criminal case.

[38] The credibility of the affidavit to the warrant has already been undermined by the evidence that Jalovec did not have an informant and was relying on information which Mitchell had received from O'Neal. And the sufficiency of O'Neal's information alone as the basis for a warrant is questionable. *See Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *See also Franks* v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *United States* v. *Carmichael*, 489 F.2d 983 (7th Cir. 1973) (*en banc*).

from a reliable informant, this contention would be strengthened.

In his complaint for the search warrant, Groth stated that his informant had been inside the Hampton apartment on December 1 and had seen illegal weapons. The complaint also stated that this informant had provided reliable information which led to two prior, successful raids for illegal weapons and information which led to several convictions. At his deposition five years later, Groth said that this informant had told him about illegal weapons, persons who frequented the apartment, and the layout of the apartment. When asked about the informant's identity and reliability, however, Groth refused to elaborate further upon the information contained in the affidavit, saying that to do so would endanger the lives of other persons.

At trial Groth persisted in his refusal to answer questions which related to the identity of the informant. Plaintiffs moved to compel his testimony. The trial judge then held a private, *in camera*, off-the-record meeting with Groth in which he asked him only one question—the identity of his informant. Groth refused to answer, saying that he would maintain his silence even if it would lead to "consequences" for him. On the record the court repeated the question and received the same answer. The court then denied plaintiffs' motion to compel Groth's testimony.

The trial court did not permit the development of a record on the questions of Groth's credibility regarding the existence and reliability of his informant

and the danger the informant might be subjected to if his identity were disclosed. The court concluded that the reliability of Groth's informant was established by the results of the raid and, therefore, inquiry into his identity was irrelevant. At the end of trial, the judge refused to give instructions to the jury which would have allowed it to decide whether the informant existed and whether information about the informant was relevant to the conspiracy and Fourth Amendment claims of plaintiffs.

Since *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), it has been clear that the so-called informer's privilege (the privilege that protects the identity of a person which otherwise would be required to be disclosed during the course of litigation) is not absolute.[39] In *Roviaro* the Court

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[39] The trial judge, in his "Summary," never mentioned *Roviaro*. In fact, he cited only a Missouri appellate court criminal case, *Ex parte McClelland*, 521 S.W.2d 481 (Mo. App. 1975), to support his conclusion that Groth was not required to disclose the identity of his informant. Apart from the judge's obvious failure to apply the appropriate controlling precedent, his analysis and reliance on *McClelland* is not entirely accurate. There is a factual similarity between *McClelland* and the instant case: in both, a police officer refused to identify his informant. More importantly, though, *McClelland* recognized that the decision to compel disclosure or not should be based on a balancing test. And the two factors which the *McClelland* court said would justify disclosure, when translated for application in the civil context, are present in the instant case: The informant may have been a witness, if not a participant, to the conspiracy which constitutes the basis of the action, and the reasonableness of the law enforcement officers' conduct is dependent upon the reliability of the informant. *See id.* at 485. Thus, even under *McClelland*, disclosure would have been appropriate.

said, "Where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 77 S.Ct. at 628. The Court went on to explain the test to be applied to determine when disclosure is required:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

The *Roviaro* test has been applied in the context of civil litigation in a variety of cases, *see e.g., Socialist Workers Party* v. *Attorney General*, 565 F.2d 19 (2d Cir. 1977) *cert. denied*, 436 U.S. 962, 98 S.Ct. 3082, 57 L.Ed.2d 1129 (1978); *Westinghouse Elec. Corp.* v. *City of Burlington*, 122 U.S.App.D.C. 65, 351 F.2d 762 (1965), and we see no reason to depart from this well-established rule. The language employed by the Court in *Roviaro* encompasses civil litigation as well as criminal litigation, and the competing interests underlying the privilege and its exceptions are essentially the same in both contexts.[40]

[40] The determination of the guilt or innocence of a criminal defendant has been characterized as qualitatively more significant than civil litigation, thus justifying a higher threshold of justification for exceptions to the privilege in civil cases. However, the difference in "significance" of criminal and civil cases simply should be considered another factor in the *Roviaro* balancing test. Further, the proposition that all civil cases are less significant—and therefore require a higher level of justification for the disclosure of the identity of the informer—than all criminal cases is a dubious one. It would seem impossible to conclude absolutely that every criminal misdemeanor case is "more significant" than civil actions to redress, for example, egregious violations of an individual's rights.

See Westinghouse, supra, 122 U.S.App.D.C. at 72, 351 F.2d at 769. As the *Westinghouse* court concluded, "The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure 'is essential to a fair determination of a cause.' 353 U.S. at 61, 77 S.Ct. at 628." *Id.* And in striking this balance, the court should examine the "relevance" of the informer's information to "possible defenses," [41] the "possible significance" of the information, and "the seriousness of the litigation." *Id.* 122 U.S.App. D.C. at 74, 351 F.2d at 771.

The trial judge never attempted to apply the *Roviaro* balancing test or to determine whether disclosure was essential to a fair determination of plaintiffs' cause of action. The judge, in fact, resisted plaintiffs' efforts to develop a record on these issues. Ordinarily, we would remand the disclosure issue to the trial court for adjudication under the appropriate legal standards. In this case, however, enough evidence relevant to the validity of Groth's assertion of

[41] And, conversely, the relevance to the establishment of a cause of action.

informer's privilege has been amassed throughout the trial to make such a remand unnecessary.

A considerable amount of evidence was introduced leading to the conclusion that either Groth did not have an informant and merely repeated information he had received from Jalovec in the affidavit for the warrant or that O'Neal was Groth's informant as well as the ultimate source for Jalovec's information. First, Groth had no record of payments to his informant since, according to Groth, the informant's information was provided for advancement in other areas. Groth never elaborated what these incentives were. Further, the similarity of the content and the timing of the information received by Jalovec and Groth is striking: Each said that on December 2 his informant told him about the weapons, inhabitants and visitors to the apartment, the apartment's layout, and the BPP meeting on December 3. And while, as the state defendants correctly indicate, this could mean simply that the reports provided by two different sources were corroborated, the fact that each report was similarly incorrect about the number of sawed-off shotguns in the apartment casts doubt on this explanation. Groth's destruction of all the information he received from his informant, including the floorplan he allegedly constructed based on his informant's description of the apartment, also undermines Groth's claim that he had an independent source. More importantly, Jalovec asked Mitchell after the raid if he cared whether it was disclosed that he was "the source" for the information leading

to the raid. And both Piper and Mitchell sent memoranda to the FBI in Washington which said that O'Neal was the only source for the preraid information about the weapons and the apartment.[42]

A determination that Groth's informant did not exist would have significant ramifications for plaintiffs' case. The warrant used to gain entry to the apartment would be supported only by the misrepresented, triple hearsay Groth received from Jalovec, and Groth's own perjured statement. Perhaps more importantly, such a conclusion would bolster plaintiffs' conspiracy claims. It would be powerful evidence of Groth's bad faith vis-à-vis plaintiffs. And it would highlight the importance of the federal defendants in the alleged conspiracy. If O'Neal was the only eyewitness informant able to provide the crucial preraid information about the apartment, there could be no question that he and his conduit to the state defendants, Mitchell, were indispensable to the entire operation.

Even if Groth did have an informant, disclosure of his identity would be important to a resolution of the case since that informant might be a critical figure in the conspiracy alleged by plaintiffs. If

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[42] The danger that law enforcement officials, protected by the informer's privilege, may, and have misrepresented themselves on affidavits for warrants, saying that informers have provided information which they have not provided, has been recognized by the courts. *See, e.g., McCray* v. *Illinois*, 386 U.S. 300, 316 n.2, 86 S.Ct. 1575, 16 L.Ed.2d 546 (1967) (Douglas, J., *dissenting*); *United States* v. *Pearce*, 275 F.2d 318, 322 (7th Cir. 1960).

O'Neal, who was being paid for his work by the federal defendants, was also the informant Groth relied on in his affidavit, plaintiffs would have additional evidence of the federal involvement in the raid itself. Further, the person described by Groth as his informant—according to Groth a member of the BPP —could be a coconspirator. Groth said that his informant asked when he was going to "move on the crib," and provided information about the weapons when told that the presence of weapons in the apartment would precipitate a raid. Also, as a member of the BPP, Groth's informant may have been in the apartment or at least with Hampton the night before the raid—an important fact given the testimonial and scientific evidence introduced by plaintiffs suggesting that Hampton had been drugged prior to the raid.

Disclosure of Groth's informant's identity is "essential to a fair determination" of this case. *Roviaro, supra,* 353 U.S. at 61, 77 S.Ct. 623. The plaintiffs' request for disclosure is based neither on mere speculation about the informant's identity, *see United States* v. *Prueitt,* 540 F.2d 995 (9th Cir. 1976), *cert. denied,* 429 U.S. 1063, 97 S.Ct. 790, 50 L.Ed.2d 780 (1977), nor on a desire to extract punitive damages from an additional defendant. *See Black* v. *Sheraton Corp. of America,* 184 U.S.App.D.C. 65, 564 F.2d 550 (1977). We are mindful of "the public interest in protecting the flow of information," *Roviaro, supra,* 353 U.S. at 62, 77 S.Ct. at 629, but we also are aware of the need to maintain the integrity of and confi-

dence in the criminal justice system. The assertion of informer's privilege by a law enforcement official defending against a civil suit for damages based on his own alleged official misconduct should be scrutinized closely.

This case, in which plaintiffs have alleged gross misconduct by federal and state law enforcement officials and have presented serious evidence to support these claims, is of paramount significance. There is a serious factual controversy focusing on the existence or identity of Groth's informant, and a resolution of this controversy is essential to a just adjudication of plaintiffs' claims. Thus, we conclude that the public's interest in encouraging the flow of information to law enforcement officials cannot prevail in this case, and that Groth must disclose the identity of his informant. In order to minimize both the risks to this particular informant and any adverse effects on law enforcement generally, we suggest that the appropriate parties move at the retrial for a protective order to set the terms of this disclosure.

VIII. CHALLENGED DISCOVERY RULINGS

Even though the judgments for the defendants must be vacated and the cause remanded for a new trial because of the trial judge's errors in directing verdicts for the defendants, we deem it necessary to discuss a separate issue: the delaying and obstructive tactics of the federal defendants and their counsel in matters of discovery. To demonstrate the im-

portance of the delay and its crippling effect on plaintiffs' case, a full summary must be undertaken. Only for the sake of brevity do we refrain from reciting all the details.

A. Pre-Trial Discovery

In March 1974 a subpoena duces tecum was issued for FBI Agent Roy Mitchell's deposition calling for all information furnished by O'Neal on plaintiffs and the BPP from 1968 through 1970. In April 1974 thirty-four documents were turned over by the defendants. By affidavit the FBI represented that these were the only ones within the scope of the subpoena. Government counsel affirmed this in open court.

In July 1974 a subpoena duces tecum was served on Marlin Johnson for FBI files on plaintiffs and the BPP. No documents were produced, and Johnson refused to answer questions on deposition about the FBI's counterintelligence program and the federal grand jury proceedings.

In the latter part of 1974 plaintiffs subpoenaed FBI Agent Robert Piper and the Special Agent-in-Charge of the Chicago FBI office, Richard Held, for depositions duces tecum. No documents were furnished. Assistant United States Attorney Arnold Kanter informed the court that he had reviewed the FBI files and found the thirty-four documents already furnished were the only ones that were relevant. Piper refused to answer deposition questions on matters such as the counterintelligence program, wiretaps, and informants.

In response to the Held subpoena, Government counsel, in February 1975, delivered a packet of counterintelligence documents to the trial judge for an *in camera* inspection on the representation that the documents were "irrelevant." Over plaintiffs' protest the judge examined the documents before plaintiffs could be heard on the propriety of the submission. The judge ruled that the counterintelligence information which he had examined *in camera* was "irrelevant and immaterial." Later it was discovered that among the documents submitted were the Jeff Fort "hit letter;" a memo which applauded the December 4, 1969 raid as a counterintelligence achievement; documents which showed O'Neal to be implementing counterintelligence operations and acting as a provocateur; and a directive from the FBI headquarters in Washington which called for measures to "cripple" the BPP.

In March 1975 the trial judge entered an order at plaintiffs' request requiring the production of documents that contained information relating to plaintiffs or the raid. In June 1975 plaintiffs received 193 documents in response to this order.

The FBI witnesses continued to refuse to answer any questions on deposition that related to their counterintelligence activities on the BPP. In August 1975 plaintiffs renewed their attempts to subpoena documents from the FBI files. Government counsel resisted and made representations to the effect that plaintiffs had received all pertinent documentary material. The subpoena was denied by the trial judge.

Three additional attempts made by plaintiffs prior to trial brought similar results. In fact, the last effort to obtain relevant documents was denied by the judge before Government counsel filed their response.

B. Trial Discovery

When the trial started in January 1976 plaintiffs had received over 200 extensively excised documents from the FBI. On the opening day of trial, plaintiffs issued trial subpoenas on Held, Mitchell, Piper, and Johnson calling for relevant counterintelligence documents. After the jury was selected, the judge admitted that he had made a "mistake" in allowing the federal defendants to determine the relevancy of the documents. He thereupon ordered the complete O'Neal and plaintiffs' files maintained by the FBI to be turned over to plaintiffs as well as the counterintelligence documents which plaintiffs had previously sought. In response to the order, Government counsel turned over approximately 100 documents which contained many deletions. Hearings were held to determine the propriety of the deletions. The court sustained all deletions which did not mention the BPP directly.

On February 2 plaintiffs moved to reopen discovery in order to depose the FBI defendants and other agents. Three days later plaintiffs again issued a trial subpoena on Held, this time requesting certain documents relating to the case, including those concerning the Racial Matters Squad and payments to O'Neal. Government counsel moved to quash the subpoena and Assistant United States Attorney Kanter represented to the court that the plaintiffs would be furnished the entire O'Neal file, including all information concerning payments to him. On February 26 the FBI completed its turnover of the O'Neal documentary material, and again it was represented that this constituted the complete file.

At a later date Mitchell was called to the stand. Prior to his testimony, plaintiffs asked for a hearing to review the Government's deletions in certain documents which had been furnished. During the hearings relevant documents which had not been produced were discovered to exist in the Government's files. Moreover, after Mitchell took the stand he volunteered certain information allegedly supplied by O'Neal that was not contained in any document which had been produced by the Government. The court ordered Mitchell to search for the document. Kanter again represented that the complete O'Neal file had been furnished. While Mitchell was still on the stand, he reported that he had found the document in a FBI file relating to a BPP member who lived in Rockford, Illinois. Mitchell conceded that the document should have been placed in the Hampton or O'Neal files but that it had not been located there. Plaintiffs then moved for the complete Hampton and O'Neal files to be brought into open court. The court granted the request. Although Kanter admitted that the O'Neal documents were indeed located in the Hampton and O'Neal files, he excused the nonproduction as an oversight.

Despite the court's order, Kanter produced only one volume of the O'Neal file. Thereupon the judge ordered that the entire files on Hampton, O'Neal, the plaintiffs, and the BPP be brought into the courtroom. The Government responded that there were 135 volumes of files which responded to the court's order. The next morning the Government produced nearly 200 volumes of files in open court. Although acknowledging that the documents should have been produced earlier, the judge stated that he deemed it a mistake or negligence on the part of the FBI in failing to comply with his order. He informed the jury that they were to "blame him" rather than the parties or their attorneys. Plaintiffs moved for sanctions, including holding the Government attorneys in contempt. The judge refused to hear the motions, indicating that he would defer any hearings until after the trial. The judge, however, said that he would allow plaintiffs to recall the federal defendants to the witness stand in order to examine them on documents which plaintiffs did not have at the time of the witnesses' examinations.[43] Plaintiffs asked that the trial be suspended until all the documents had been produced. The judge denied the request.

On April 8, three months after the trial began, Government counsel completed the turnover to plaintiffs of the twelve volumes of Hampton files and sixteen volumes of O'Neal files. One of the O'Neal files

[43] In March 1977 the trial judge changed his position and refused to permit plaintiffs to reexamine Johnson and Mitchell.

contained a document written by Piper claiming FBI credit for the December 4 raid and asking that the FBI pay a bonus to O'Neal for his furnishing the floorplan of the apartment and setting up the raid. At that point the Government's entire turnover consisted of fifty volumes of documents, of which plaintiffs had received about six percent before Mitchell's inadvertent reference to the O'Neal document.

On April 16, 1976 the FBI revealed to the court and plaintiffs' counsel the existence of 45 additional files in its possession pertaining to the case. On May 6 the Government furnished two volumes of documents relating to plaintiffs. Among these documents were instructions from the FBI's headquarters in Washington "to destroy what the BPP stood for," to engage informants in thefts of BPP records and documents, to escalate actions against the Panther Breakfast Program for Children and other similar activities, and to combat the adverse publicity of the December 4 raid. Many of these instructions had Piper's and Johnson's initials on them.

On May 11, 1976, four months into the trial, the court ordered the production of other FBI files, including the balance of its counterintelligence program file. In response the Government furnished thirteen additional files. These included three volumes of counterintelligence, three volumes relating to federal grand jury proceedings, two volumes relating to the Breakfast Program, and one volume concerning the June 4, 1969 search of the BPP headquarters. In these files were counterintelligence docu-

ments which called for the destruction of the Breakfast Program and for the use of local police to harass the BPP for possession of guns. Many of these documents were approved by Johnson, Piper, and Mitchell. On June 14, 1976 the Government furnished the plaintiffs two more volumes of documents; these related to wiretaps on the BPP.

On June 30, 1976 the court finally denied plaintiffs' motion to reconsider its February 26 order which quashed the second Held trial subpoena duces tecum. The court also denied plaintiffs' request for production of other files relating to the case, finding that their production would be duplicative of the files already produced. The court also found that the Government's deletions and withholdings were proper.

It is clear that federal defendants, Johnson, Piper, and Mitchell, and their counsel, rather than promptly furnishing relevant documents as requested, deliberately impeded discovery and actively obstructed the judicial process, thus denying plaintiffs the fair trial to which they were entitled.[44] Regrettably, the trial judge permitted these tactics. Moreover, he repeat-

[44] The federal defendants contend that since the documents in question are official FBI documents, they had no control over them and should not be held responsible for the obstructive tactics regarding their production in the course of discovery. Neither federal defendants nor their counsel (provided by the federal government) said at trial, however, that the delays in producing the relevant documents were caused by their lack of control over the documents; instead, the record is replete with statements by the federal defendants and their counsel suggesting that documents which were discovered later never existed.

edly exonerated the federal defendants for their derelictions. Instead of applying sanctions on these defendants and their counsel, the court assessed costs against plaintiffs in excess of $26,000 for the Government's time in reproducing the documents which were finally furnished to plaintiffs only under the orders of the court.

If there were any doubts about the sufficiency of the evidence when considered under the applicable standard constituting a jury question on liability, the delay of the federal defendants in meeting their obligations to produce relevant documentary material would supply a basis for an inference that plaintiffs were unable to present all the available evidence and thus were denied the opportunity to prove their case. On retrial the court should consider plaintiffs' contention that they ultimately were denied full discovery. Moreover, sanctions should be imposed, pursuant to Fed.R.Civ.P. 37(b)(2), against the federal defendants and counsel representing them at the first trial for repeatedly disobeying court orders to produce documentary material.[45]

[45] Fed.R.Civ.P. 37(b)(2) states in relevant part:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

IX. DISMISSAL OF BREWERS DIVERSITY COUNTS

The state defendants challenge the appealability of the trial court's dismissal of Counts 15, 16, and 17 of the amended complaint. Plaintiff Verlina Brewer originally filed a separate complaint against the state defendants, including the City of Chicago and Cook County, Illinois. The complaint alleged common law torts of assault and battery, false imprisonment, and malicious prosecution. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332. In the consolidated amended complaint the three counts of the original complaint became Counts 15, 16, and 17, respectively.

Prior to trial, state defendants moved to dismiss the Brewer counts for lack of diversity or, in the alternative, to sever them for trial. The district court granted severance, and took under advisement the dismissal aspect of the motion. At the conclusion of trial and after the state defendants had again moved to dismiss the Brewer counts, the district court on June 30, 1977 filed an order which read in pertinent part:

> For the reasons set forth in the State defendants' original motion, their recent motion and in the arguments of counsel for the State defendants and based upon the entire record of this case, the court finds that said counts 15, 16 and 17 should be dismissed.

The actual dismissal order was entered July 1, 1977.

Prior to the events just described, the district court on April 15, 1977 granted motions for directed verdicts in favor of all defendants except the seven shooters. Later, on June 20, 1977, the court granted directed verdicts in favor of these seven and entered judgment for all the defendants on the basis of the directed verdicts. The court's order reads:

> It is Ordered and Adjudged that the Court finds as a matter of law that the plaintiffs and each of them have failed to sustain their burden of proof on the issues of each and every count remaining in the plaintiffs' amended complaint, accordingly the defendants' motion for a directed verdict in favor of each and every defendant and against each and every plaintiff is granted and judgment is entered herein together with costs against each and every plaintiff and in favor of each and every defendant.

On June 22, 1977 plaintiffs, including Brewer, filed a notice of appeal from the orders of April 15, 1977 and June 20, 1977.

It is apparent from this sequence of events that the notice of appeal filed June 22, 1977 did not encompass the dismissal of Counts 15, 16, and 17 which occurred on July 1, 1977. No notice of appeal was filed with respect to these specific counts. Brewer's argument is that this defect in the notice of appeal should not be fatal because an intent to appeal the district court's ruling regarding her common law counts can be implied. The argument is unpersuasive. Although courts generally have held that an error in designating the judgment appealed from is not per se

fatal if an intent to appeal from a specific judgment can be inferred, *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 140 (1976), that rule has no application here. Because of the severance, the judgment for the defendants based on the directed verdicts did not affect the viability of Brewer's common law counts. Therefore no inference of inclusion in the only notice of appeal can be made.

Accordingly, the dismissal of the Brewer common law counts is not properly before us.

X. ATTORNEYS' FEES

Plaintiffs seek, in addition to a reversal of the district court judgments and a remand for a new trial, an award of attorneys' fees for "their efforts to date." The request is based on the Civil Rights Attorney's Fees Awards Act of 1976 [the Act], Pub.L. No. 94-559 (Oct. 19, 1976), codified in 42 U.S.C. § 1988. We grant the request for an award of attorneys' fees for their appellate work, but hold that plaintiffs presently are not eligible to receive an award for their trial endeavors.

Section 1988 as amended reads:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This court has recently held in *Davis* v. *Murphy*, 587 F.2d 362 (7th Cir. 1978), that the Act permits a prevailing plaintiff on appeal to receive fees for appellate work. Accordingly, we have the discretion to award a reasonable fee to plaintiffs as part of their appellate costs unless special circumstances render such recovery unjust. Fed.R.App.P. 39. *See also Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977). A review of the record fails to disclose any special circumstances which would render an award inequitable.[46] No affidavits have been submitted by plaintiffs, however, to support their request. Therefore, plaintiffs should submit to this Court a statement of the fees requested supported by any relevant material and in affidavit form. Defendants shall be afforded an opportunity to respond. Employing the standard expressed in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), factors bearing on the amount of the award will include

> (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether

[46] The state defendants argued in a motion to strike the "Anderson" reply brief that plaintiffs' request for attorneys' fees is not a proper subject for consideration because the request was not raised in plaintiffs' opening brief. Plaintiffs, however, did assert the statutory basis for attorneys' fees in their main brief althrough the argument was directed to the federal defendants.

> the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Id. at 717-19, as cited in *King* v. *Greenblatt*, 560 F.2d 1024, 1026-27 (1st Cir. 1977), cert. denied, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978).

Plaintiffs also seek attorneys' fees for their trial work. The language of the Act precludes an award to the unsuccessful party in a civil rights trial. In the case at bar, plaintiffs were not "the prevailing party" at the trial level and therefore are not permitted to receive fees for that effort under section 1988. In light of our decision today, however, we hold that if plaintiffs ultimately prevail, the district court shall award reasonable attorneys' fees for the district court phase of the case preceding this appeal in addition to any further attorneys' fees the trial court may deem appropriate after retrial.

XI. CONTEMPT JUDGMENTS

In separate appeals Jeffrey H. Haas and G. Flint Taylor, attorneys for plaintiffs, asked that the contempt judgments entered against them be reversed. These appeals have been consolidated with the main appeal. In order to appraise fully these contempt matters, it is necessary to present the facts in detail.

TAYLOR

In the last days of October 1976 plaintiffs called Robert Zimmers, the FBI firearms expert, as a witness. On November 1, while Zimmers was on the stand, the following took place:

> Mr. Haas [attorney for plaintiffs]: I now show you what I will mark as RZ51 and ask you what type of weapon is this, sir?
>
> Mr. Zimmers: A double-barrelled Stevens shotgun, which bears serial number 43312 . . . .
>
> Mr. Haas: Could we have a stipulation, your Honor, that this weapon was taken on the raid by George Jones?
>
> Mr. Witkowski [attorney for defendants]: Yes.
>
> The Court: So stipulated . . . Let the record show that counsel has so agreed.
>
> Mr. Witkowski: Yes, your Honor.

Several days later Haas again presented the Jones shotgun to Zimmers on the witness stand.

> Mr. Haas: And is that the item, RZ51, the double standard sawed-off shotgun which we have shown you earlier, sir?
>
> Mr. Zimmers: . . . Yes, this is the one.
>
> Mr. Haas: And it has been stipulated that this is the weapon that was carried by Officer Jones on the raid of December 4, 1969.

At that point defense counsel objected. The judge said he would hear the objection outside the presence of the jury. Attorney John P. Coghlan, defense counsel, then argued that the defendants had never entered into a stipulation using the word "raid." He

accused Haas of a "deliberate, wilful and intentional attempt to prejudice the jury." Haas said that his statement about the stipulation was accurate. At that point Taylor asked for a recess so that the transcript could be inspected. The judge denied the request.

When the jury returned to the courtroom, the judge announced: "Mr. Haas has deliberately and wilfully misread a statement. I direct you [Haas] to read that statement, that stipulation, corrected." Haas said he had stated the stipulation correctly. The judge then asked Coghlan to "state the stipulation correctly." Coghlan extemporized:

> Mr. Coghlan: The stipulation is that the weapon that was shown to the witness was one of the weapons carried by the officers serving a search warrant at 2337 W. Monroe.
>
> The Court: Now that is it . . . .

During the next two days plaintiffs' counsel repeated their requests on several occasions to review the court's transcript because they had none of their own. Finally, on November 10, the judge permitted the inspection.

The next day plaintiffs' counsel presented a motion to "Correct Prejudicial Remarks Made by the Court to the Jury and For Mistrial," supported by the transcript showing Haas' statement was not a misrepresentation. The judge summarily said he was taking the motion under advisement, and gave defense counsel ten days to respond. Haas argued that the prejudice should be cured as soon as possible. The

judge refused to reconsider. At that point counsel for plaintiffs returned to their table flinging down their papers. Taylor's hand struck a pitcher of water on the table. The pitcher slid along the table top and fell to the floor near the jury box. The glass lining broke and water spilled on the rug. All of this took place while the court was in recess and the jury out of the courtroom. The transcript reads as follows:

> The Court: I have entered my order.
>
> Now, there is one juror who has not arrived yet. We will now recess until—
>
> All right. Let the record show the conduct of both counsel in throwing papers around and one of them—what is it that is broken over there?
>
> Mr. Coghlan: Sir, there is broken a glass water pitcher.
>
> The Court: All right. Mr. Taylor, you did that, and you are now held in contempt of court, and the Court now orders you committed to the custody of the Attorney General of the United States for a period of 24 hours, and orders the Marshal to take you into custody forthwith.
>
> Mr. Taylor: May I be heard, your Honor?
>
> The Court: No, sir.
>
> Mr. Taylor: I have the right to speak before I am summarily sentenced, and I want to say—
>
> The Marshal: This court will stand in recess.

After a brief recess, the trial resumed. The judge ordered that the pitcher and debris be left before the jury box. Haas made several requests to be heard out of the presence of the jury concerning the incident. The requests were denied. The judge, how-

ever, did grant a request of Special Corporation Counsel Camillo F. Volini that Volini's photographer take pictures of the broken pitcher. Although the judge refused to permit the press to take photographs, he told Volini that "they [the press] may have a copy of the picture that is taken." He also told defense counsel to have the press "pay you whatever it costs," if they desired a copy.

After the incident, an attorney appeared on behalf of Taylor and attempted to be heard. The judge refused the request telling the attorney to return later in the day. Near the close of the afternoon session, the judge, without hearing argument on behalf of Taylor, entered the following order:

> The Court finds that a motion was made by counsel for plaintiffs herein, and the Court ordered counsel for defendants to answer the same within 10 days. Both Jeffrey Haas and G. Flint Taylor, two of the attorneys for plaintiffs, demanded an oral hearing, which the Court denied. Immediately after the Court refused to hear them orally, Attorney G. Flint Taylor, *in a fit of anger*, threw paper, books and other objects on the table for counsel, including a decanter with an inside glass lining, which was broken. Water and glass were sprayed over the floor in front of the jury box. Present in the Court were a number of spectators and representatives of the press.
>
> The Court finds that such action was a contemptuous and constituted willful and deliberate contempt of this Court in its presence at 10:30 a.m.,

> November 11, 1976. The Court does hereby find Attorney G. Flint Taylor in contempt of Court, and does hereby order and direct that he be and is hereby committed to the custody of the Attorney General of the United States for a period of 24 hours, ending at 10:35 a.m. on November 12, 1976.
>
> The Court further orders and directs the United States Marshal to immediately execute this order and take Attorney G. Flint Taylor into custody forthwith.

The judge immediately amended the order by substituting the words "in the presence of the Court" for "in a fit of anger." He also commuted the time to be served.

HAAS

On February 22, 1977 Hanrahan was recalled as a witness after a four-day interval during which Treviranus had testified regarding the federal grand jury investigation. Treviranus identified a memo he had written which outlined the arrangement between Hanrahan and Assistant Attorney General Leonard whereby the raiders would not be indicted by the grand jury and Hanrahan would terminate the prosecution in the state court against the survivors of the raid. The court had deferred a request to introduce the document while Johnson and Treviranus were under examination. With Hanrahan back on the stand the transcript reads:

Mr. Haas: Sir, were you present at a meeting with Marlin Johnson in late March or early April of 1970 in which he indicated that there would be no indictments of police officers or yourself?

Mr. Hanrahan: No, sir.

Q: Well now, didn't—Mr. Hanrahan, didn't you tell the Federal prosecutors on or about April 8 that you were going to drop the indictments against the occupants of the apartment?

* * * * *

A: My recollection is that on the second date that I appeared before the Grand Jury I indicated that they would review the indictments that are pending and probably dismiss them.

Q: You are referring to May 5th of 1970?

A: I am referring to the second occasion that I appeared before the Federal Grand Jury. It was early in the year and I believe it was in May.

Q: But prior to that you had entered an agreement with the Federal prosecutors to drop the charges, had you not?

A: No, sir.

Q: And hadn't you told them that the reason that—

Defense counsel Volini objected and asked for a hearing outside the presence of the jury. After the jury had left the courtroom, Volini asked that Haas be instructed to cease asking questions concerning the agreement and that the jury be "instructed to disregard it." Arnold Kanter, counsel for the defendants, asserted that Haas should be denied the opportunity to ask more questions concerning such agreements because the witness had already asserted there were none. The judge did not rule on these motions, nor did he wait to hear from plaintiffs' counsel. He called the jury back and said, "The last question is stricken. You will disregard it." Haas then resumed his questioning of Hanrahan:

Mr. Haas: Mr. Hanrahan, do you know how it was that Leonard Treviranus knew on April 8th that the Grand Jury—

Mr. Kanter: Objection.

The Court: Now, Mr. Haas—

Mr. Haas: Wait a minute.

The Court: —we just got through out of the presence of the jury. You will not go into that subject matter any further.

Mr. Haas: I didn't even get to argue it. Well, Judge, the deal—

The Court: I said you will not go into it any further.

Mr. Haas: Judge, we can't cover up the coverup.

Mr. Witkowski [attorney for defendants]: Your Honor—

Mr. Haas: That is part of our complaint, that they covered up, Judge.

Mr. Coghlan: If the court please—

The Court: Mr. Haas, you are now held in contempt of court for the last remark directed to the Court, and I will prepare an order accordingly.

Mr. Taylor: May the jury be excused—

The Court: The Court will take a recess, and we will prepare an order holding you in contempt.

Mr. Haas: All right, Judge. I think all the people who have spoken the truth have always ended up in contempt, and the coverup goes on and on and on.

Mr. Taylor: And Mr. Treviranus testified on Friday, Judge.

The Court: I will hold you in contempt and I will now turn you over to the custody—

Mr. Haas: O.K., Judge.

The Court: —of the U.S. Marshal for contempt, and hold you in custody until tomorrow morning at 9:00 o'clock.

Mr. Haas: All right, Judge, I would just—

Mr. Taylor: There is a document right here that says there was—

The Court: Court now stands in recess.

Haas was taken into custody by the United States Marshal and ordered held until the following morning. An order was entered by the judge that day finding that Haas' "statements and actions in the presence of the Court are serious and that it resulted in the obstruction of the administration of justice . . . ." The judge referred to no specific language, but did recite "certain statements in open court in the presence of the jury as set forth in the transcript of the Court proceedings certified by the court reporter and attached hereto made a part hereof." The court denied a motion for appeal bond, and Haas remained in jail until the next morning. On the following day the

judge reversed his ruling and heard extensive testimony from Hanrahan about the alleged arrangement.

Unquestionably, a court has the power to punish summarily contemptuous conduct which occurs in the presence, sight, or hearing of a presiding judge. *Ex parte Terry*, 128 U.S. 289, 302-04, 9 S.Ct. 77, 32 L.Ed. 405 (1888). For example, that the contumacious refusal of a witness to testify, "may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement." *Ex parte Hudgings*, 249 U.S. 378, 382, 39 S.Ct. 337, 339, 63 L.Ed. 656 (1919).

The power of a federal court to punish immediately and summarily for "direct contempt" is codified in 18 U.S.C. § 401 which provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of Justice . . . .

The Supreme Court, commenting on this statute in *In re McConnell*, 370 U.S. 230, 233-34, 82 S.Ct. 1288, 1291, 8 L.Ed.2d 434 (1962), explained that this provision was enacted by Congress "in order to correct serious abuses of the summary contempt power that had grown up . . . revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts . . . to "the least possible power adequate to

the end proposed.'" " The Court in *McConnell* then defined the issue:

> Thus the question in this case comes down to whether it can "clearly be shown" on this record that the petitioner's statements while attempting to make his offers of proof actually obstructed the district judge in "the performance of judicial duty."

Id. at 234, 82 S.Ct. at 1291.

In the case before us, paraphrasing the above-quoted language, the question comes down to whether it can "clearly be shown" on the record that the respective conduct of Haas and Taylor actually obstructed the district judge in the "performance of judicial duty." We are convinced that their conduct cannot be so characterized.

The Taylor episode must be viewed against the background of the events leading up to it: The trial judge's erroneous accusation before the jury that Haas had deliberately and wilfully misread the statement about the stipulation; the judge's repeated denials to permit the inspection of the court's transcript for verification that Haas had not "misread the statement"; the judge's refusal to correct the record immediately, but in lieu thereof giving the defendants ten days to respond. These combined circumstances apparently caused Taylor to reach the "breaking point" of his patience and forbearance. We also must take into consideration that the episode occurred while the court was recessed, and that the judge permitted the fallen pitcher and broken glass to remain on the floor after the jury returned to the courtroom.

While we do not intend to condone Taylor's gesture of anger, we are convinced, in the words of Judge Duffy in his dissent in *McConnell*, ". . . there was no interference with the conduct of the trial. There was no obstruction in the administration of justice." *Parmelee Transp. Co.* v. *Keeshin*, 294 F.2d 310, 318 (7th Cir. 1961). And the Supreme Court agreed with Judge Duffy's appraisal in that case.

What we have said about Taylor's complained-of conduct applies to Haas' conduct as well. Haas was held in contempt for saying "we can't cover up the coverup." After saying this, he tried to explain: "That is part of our complaint, that they covered up, Judge." The judge, however, took the remark as personally directed at him. In the context of what had happened before, the judge, in our opinion, had no reason to interpret the remark in that manner, and should have given Haas the benefit of every doubt. This court's statement in *In re Dellinger* is pertinent:

> While *McConnell* cannot be read as an immunization for all conduct undertaken by an attorney in good faith representation of his client, it does require that attorneys be given great latitude in the area of vigorous advocacy. Appellate courts must ensure that trial judges (or the jury on remand) are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempts. Admit-

> tedly, the line defies strict delineation (Goldfarb, The Contempt Power, 172 (1971)), but by our resolving doubts in favor of advocacy, an independent and unintimidated bar can be maintained while actual obstruction is dealt with appropriately.
>
> * * * * *
>
> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows.

461 F.2d 389, 398, 400 (7th Cir. 1972). Accordingly, we find that the contempt citations are unwarranted when considered in their factual setting.

XII. CONCLUSION

The contempt judgments are reversed. In addition, the directed verdicts are reversed and the judgments of dismissal vacated, except for the claims against Purtell, Koludrovic, Sorosky, and Meltreger and all but the section 1986 claims against Ervanian and Kukowinski. The judgments of dismissal with respect to these claims are affirmed. The judgments for costs against plaintiffs are reversed. Costs on appeal and attorneys' fees are awarded to plaintiffs against all nonprevailing defendants.

The cause is remanded to the district court for a new trial. As an administrative matter, the district court is directed to reassign this case under the pro-

visions of Circuit Rule 18 and, because of its age, to direct the judge to whom it is assigned to give the retrial high priority.

FAIRCHILD, Chief Judge, concurring.

I concur in the opinion written by Judge Swygert except as qualified by the following observations.

I agree that, viewing the evidence in the light most favorable to plaintiffs, and drawing all reasonable inferences in their favor a jury verdict for them on one or more theories of liability could be sustained. I am sure that no more is meant by the frequent references in the opinion to a "prima facie" case. Because so much depends upon the fact-finder's choice among inferences, there was never any stage of this case (with the possible exception of the case against the shooters) at which the evidence compelled a verdict for plaintiffs unless rebutted.

I have some problem in analyzing the impact on plaintiffs' case of the several possible findings with respect to a conspiracy. The main objective of plaintiffs appears to be recovery of damages arising from the events of the raid. Undeniably there was loss of life, loss of liberty (including bodily injury), and invasion of privacy. The § 1983 claim for those damages must rest upon establishing that life and liberty were taken without due process of law in violation of the Fourteenth Amendment (or that privacy was invaded in violation of the Fourth and Fourteenth Amendments). If the search warrant was valid and if the force used was not excessive under

the circumstances, that § 1983 claim (and any corresponding § 1985(3) claim) must fail.

I agree that the jury could properly find a conspiracy by federal and state defendants to discredit and hamper BPP in its political activity and thus impair First Amendment rights. But it would not follow, without more, that the search, if found to be unconstitutional, or the use of force, if found to be excessive, was within the objects of that conspiracy. The activity of the federal defendants in surveillance of a group from whom violent, unlawful conduct was expected, and in informing state officers of the floor plan and possession of weapons could be found to have been legitimate activity and cooperation in law enforcement, and not wrongful acts pursuant to a conspiracy, even though the jury also found a conspiracy to disrupt or discredit BPP politically. In my view, there could be no recovery of damages, arising from the raid, based solely on a conspiracy theory, unless the jury was satisfied that the unlawful raid or the use of excessive force in carrying out a lawful raid was within the objects of the conspiracy.

In the discussion of immunity, Judge Swygert suggests that certain defendants may be liable for damages resulting from the generation of post-raid publicity misrepresenting the facts. Whatever course may be followed on retrial with respect to such a claim, it seems clear that plaintiffs cannot recover damages for injury to reputation, without more. *See Paul* v. *Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

I do not join in directing the imposition of sanctions under F.R.Civ.P. 37(b)(2), although I would favor directing the district court to give consideration to doing so, on remand.

I would limit the holding that a prosecutor is not entitled to full immunity while performing "investigative" functions to the investigative functions of the prosecutor defendants described in this case.

PELL, Circuit Judge, dissenting in part, concurring in part.

It has been difficult for me to place this case in a proper perspective, but following the effort to do so I am convinced that the opinion written by Judge Swygert reaches an incorrect result in a substantial number of instances. Therefore while concurring in that opinion wherein it affirms the district court's judgment and with regard to the reversal as to one group of defendants on one issue, I otherwise respectfully dissent, all as set forth hereinafter.

The initial difficulty in acquiring a proper perspective, indeed any kind of an overall view, of the case comes from the sheer volume of material it has generated. To begin with, the mass of documents, which is what this court basically has to go on to make its decision, includes some 37,000 pages of evidence, plus exhibits which we can only view visually as a cold record but which was presented audibly to the district court bit by bit, painstakingly and tediously, over the approximate eighteen months that this civil case jury trial took. Next we have before us the

contentions of the parties in the so-called briefs, occupying more than 800 pages. At this point, the accumulation of additional paper might appear to be drawing to a welcome close. There is virtually no dispute as to the basic law applicable to the appellate treatment of directed verdicts. At the risk of oversimplification, they are not favored by the law and the judgments based thereon will be reversed when the evidence reflects that reasonable persons in a fair and impartial exercise of their judgment may draw different conclusions therefrom. Thus it would seem that if the 37,000 pages reasonably exhibited a basis for different conclusions, the resulting decisional opinion, unless it were designed to serve some other purpose than its primary one of disposing of the case, could be of fairly short length. Alternatively, of course, if there is difficulty in finding a solid base in the monumental record we have here for different conclusions under the applicable law, the effort to reverse might necessarily achieve extensive proportions. In any event, Judge Swygert's opinion has added to the bulk more than 125 typed pages.

The matter of a proper perspective is further made difficult by the diverse approaches of the parties which I might have assumed before becoming involved in the case was to recover monetary damages for claimed wrongs visited upon them by the state and federal defendants. From my evaluation of their briefs and oral arguments, however, there is not this single-minded pursuit. One group of plaintiffs, whom for convenience of reference I will call the Hampton

plaintiffs, consists of the Administratrix of the Fred Hampton estate, Hampton's girlfriend and the mother of his posthumously born child, and two other persons. Of the four Hampton plaintiffs, three were present in the apartment at the time the raid occurred and two of the three were wounded. The fourth Hampton plaintiff is the personal representative of one of the two persons killed in the raid.

While the compact original brief filed by the attorney for the Hampton plaintiffs does purport to incorporate by reference most of the issues and supporting arguments advanced by the remaining plaintiffs (with the exception of those dealing with the bias and prejudice of the trial judge and his failure to recuse himself), this brief "relates to the directed verdict granted, following the dismissal of the jury as distinguished from the [earlier] directed verdict regarding the Federal and certain State defendants." While the reply brief of the Hampton plaintiffs does advance some argument as to the conspiracy and liability vis-à-vis the federal defendants, it appears abundantly clear to me that the prime thrust of the Hampton plaintiffs both in briefing and oral argument is toward the most vulnerable underside of this litigation, the directed verdict as to the defendant raiders who engaged in shooting in the apartment. This appears to me to be a realistic evaluation of this civil damage case and one best designed to achieve the purpose of the case, that of expeditiously collecting damages from claimed wrongdoers without undertaking once again the agonizingly extended trial of

extraneous political issues. I can only assume that the Hampton plaintiffs' attorney is pursuing that which his clients most desire, compensation for the wrong which they feel they suffered.

The remaining five plaintiffs, designated for convenience as the Anderson plaintiffs, includes the Administratrix of the Estate of Mark Clark and two more of those who were wounded. While all of these people no doubt will not spurn any recovery that might be made in their behalf, I come away from an examination of this case with the distinct sensation that the Anderson plaintiffs' lawyers, although equally willing for and desirous of a substantial money recovery, are fervently bent on attempting to demonstrate the existence of a widespread and sinister conspiracy among top law enforcement officials, state and federal, serving in the Chicago area in 1969, to kill Fred Hampton and other functionaries of the Black Panther Party. Their wide-ranging and vociferous charges indicate that the conspiracy was racially motivated to put down and destroy people associated with a political movement. But, the tenor and scope of their assertions is best illustrated by these quotations from their brief's Introduction and Statement of the Case:

> In response to this challenge to white supremacy, the F.B.I. mobilized to stop this political movement. They implemented and refined illegal, unconstitutional counterintelligence tactics designed to neutralize and destroy these organizations with special, violent emphasis on those lead-

> ers and organizations such as the B.P.P. who sought the liberation of black people. This program, implemented and run in Chicago by the F.B.I. Defendants, solicited and obtained the willing assistance of State's Attorney EDWARD HANRAHAN—who was himself anxious to gain political prominence by exploiting racism. HANRAHAN and his special political police force, in conspiracy with these F.B.I. Defendants, planned and executed the murderous December 4th raid at the apartment of the Plaintiffs. . . . After Hampton and Mark Clark were killed, a concentrated effort was launched by City, County and Federal officials to cover up both the true nature of the political assassination as well as their involvement in it. They manipulated the judicial system at every turn to accomplish this end. HANRAHAN used his power as State's Attorney to falsely charge the survivors, and to prosecute them for six months to mask his culpability and that of his police. Richard Nixon's Justice Department, in cooperation with the F.B.I., used a Federal Grand Jury investigation to cover up the F.B.I. involvement in the raid and subsequently entered into an agreement with HANRAHAN which saved him from indictment in exchange for HANRAHAN's continued silence concerning the F.B.I. involvement. The Justice Department then attempted to put the controversy to rest in the public eye by releasing a report which was critical of both the police and the Panthers. . . . By the fall of 1975, pretrial discovery, because of Defendants' obstructions, served little purpose except to frustrate the search for truth, the Court's prejudice having

> similarly frustrated this search. . . . January 1976, the Plaintiffs went to trial in front of a Judge determined to defeat their claims and with much of the evidence which proved the F.B.I. Defendants' involvement in the raid still being concealed by the Defendants and their attorneys. . . . After 15 months of treachery to the Plaintiffs' claims the District Court, four days before the mayoral primary in which HANRAHAN was a candidate, directed verdicts for all the Defendants except those seven raiders who admitted to firing their weapons at the apartment. . . . Plaintiffs appeal, but they seek not only reversal of these grossly unfair and illegal verdicts, but sanctions and fees against the parties and their attorneys who knowingly obstructed justice in the Court below, and appropriate orders to assist them to finally obtain the discovery to which they are entitled, and strong rebuke to the trial Court who completely abused his power, trammelled the Constitution and nullified the Civil Rights Act.

Thus it seems although they are not charged as unindicted co-conspirators that the entire officialdom of government from the President to the federal district judge were intent upon bringing about the elimination of a small group of people who simply desired to achieve the desirable and constitutionally required status of racial equality.

The Introduction and Statement of the Case of the Anderson plaintiffs' brief set the tone which was followed through their 247 pages of overstated characterizations. Thus, initially, supposedly by way of

background they move on the Federal Bureau of Investigation in an endeavor to demonstrate that the FBI's counterintelligence program insofar as it was directed toward the Black Panther Party was a basis for a reasonable inference that FBI officials in reality were conspiring to implement the program by resorting to homicide of the local Black Panther leader. Conspicuously absent in the development is any reference to the fact that the program was directed toward an organization which had announced it would achieve its objectives by violent means.

The intemperance of the Anderson plaintiffs' approach is particularly demonstrated in the some 75 or more pages devoted to denigrating the district court judge. Thus, typically:

> . . . the Court, ignoring the merits of Plaintiffs' claim, denied the Motion "as not well taken." . . . The Court refused to declare them hostile witnesses or allow them to be impeached or cross examined by Plaintiffs' counsel. . . . The Court repeatedly refused to hear the motions, and angrily postponed hearing the contempt and sanctions motions until after the trial. . . . the court (in sustaining a specious objection by Defendant . . . the Court grasped at various straws in attempting to justify his baseless and punitive ruling. . . . The Court's arbitrary refusal to allow discovery concerning GROTH's alleged informant and his obstruction of meaningful cross-examination. . . . The Court, in essence, scuttled the entire Plaintiffs' rebuttal case . . . . The entire record demonstrates that the trial judge was not an

impartial judge representing the impersonal authority of the law, but was both an advocate from the bench for the Defendants' cause, and an "activist seeking combat" with Plaintiffs' counsel . . . Despite this powerful evidence of racism and prejudice against the Plaintiffs, the Court refused to allow lawyer voir dire. . . . The Court tightly controlled the voir dire, and attempted to select a jury which he could manipulate to agree with his view of the case and return a verdict for the Defendants . . . In stark contrast to the treatment afforded the Plaintiffs and their evidence, the trial court aided the Defendants and supported their cause throughout the trial, in its rulings and remarks from the bench . . . unduly restricted questioning in key areas . . . using the pretext that they hadn't been questioned with the sketch on direct . . . The Court, on its own added to the prejudicial information imparted to the jury during the course of the trial. . . . He [the judge] repeatedly threatened contempt in order to discourage Plaintiffs' to be heard and to make a record. . . . Defendants' lawyers were allowed almost free reign in the Courtroom. . . . Constant interruption from the Bench, and frivolous objections from the Defense counsel (encouraged by the Court's obvious attitudes) diluted the strength of Plaintiffs' evidence. The atmosphere of intimidation generated from the bench made an effective presentation of the evidence against Defendants difficult, if not impossible. The Court's arbitrary and ever-shifting rules made cross-examination of Defendants a perilous task, with Summary Con-

> tempt lurking behind each question. Merely rising to object was fraught with danger and likely to evoke a strong rebuke from the Court. Plaintiffs' counsel were confronted with a hostile, powerful adversary in the District Court; the damage inflicted on Plaintiffs as a result of the intimidation and belittlement of Plaintiffs' counsel by the District Court of itself requires reversal. . . . Both in specific instances, and as a whole, the court's charge to the jury revealed its bias in favor of the defendants, and constituted reversible error. . . . He [the judge] used his judicial power as well as the resources and bullying of defense counsel to harass and attack the Plaintiffs when they attempted to recuse him. [Footnotes omitted.]

I do not mean to suggest that the multi-page portions of the brief from which the above extracts were taken is not replete with specific instances purporting to show the asserted unbridled bias and prejudice of the trial judge. A close analysis of these supportive instances reflects, however, that many of them pertained to rulings in evidentiary matters as to which the trial judge is accorded substantial discretion. Any trial lawyer of any competence is aware that he doesn't prevail on every ruling of the court but that his failure to do so is no ground for a legitimate claim of bias and prejudice. Such a lawyer also is sufficiently perceptive to realize the scope of the judge's rulings and that to attempt another tack on the same forbidden subject may well occasion a rebuke. Nevertheless, the Anderson plaintiffs' trial

counsel pursued such a course and then when rebuked claimed this to be another example of the unfairness of the judge. I find the claim of unfair limitation of the presentation of their case to be virtually frivolous. A year and a half of trial and 37,000 pages of testimony scarcely is supportive of a restrictive evidentiary limitation. Nor can I find any real indication in this record that the ebullient trial counsel were intimidated by the judge. In this circuit, voir dire of the jury is conducted by the trial judge. Yet in this civil case, failing to get special treatment, the plaintiffs claim they were treated unfairly.

If there is merit in claims of incorrect judicial rulings, those rulings should speak for themselves in requiring reversal and they do not need to be sandwiched in a desperate collage of conclusory overstated characterizations. Even though it often might seem that heaping abuse on public officials is now a favorite public pastime, it does appear to me that the proper place for this steam-venting is other than in the area of appellate review. We have here the matter of the propriety of directed verdicts. I should think that while hyperbolic and cynical character castigations might create an atmosphere of suspicion and distrust, even though unfounded, it does not upon examination provide a case or controversy to go to a jury. I do not, I hasten to add, mean to suggest that history has not recorded corrupt governments, or public officials who have intentionally deprived citizens of those rights which are given to them by

our constitution. When, however, the charge is a broadside condemnation of the entire fabric of law enforcement in a large metropolis, we at the very least ought to examine most carefully the underlying facts to see if the charges are reasonably inferable or are nothing more than fanciful conjectures.

Chief Judge Fairchild observes in his concurring opinion that the main objective of the plaintiffs appears to be the recovery of damages arising from the events of the raid. I agree with him insofar as the Hampton plaintiffs are concerned but, as I have already indicated, it appears to me that the Anderson plaintiffs have a secondary objective, indeed, one which may well be a primary objective in view of their emphasis on it, and that is to use this litigation as an exposition ground for political philosophy and the courtroom as a political forum. If law enforcement or other government officials are demonstrated by evidence as having deprived citizens of their constitutional rights and in the process of such litigation those officials get smeared with the brush of villainy then it must be so; it is simply that I think the process should not go in reverse.

I regret to do so, but feel compelled in candor to add, that it appears to me that Judge Swygert's opinion, although I would question whether it was so intended, lends aid and succor to the political espousal objective of the Anderson plaintiffs. I come away from each reading of the opinion, despite occasional references therein to the requirement that

plaintiffs to recover must prove their case to the trier of fact, with the feeling that the author of the opinion thinks that the case has already been convincingly proven in many respects.

Thus, on a random basis, I note:

> Plaintiffs' prima facie case offers a number of constitutional deprivations to accompany their conspiracy allegations . . . Plaintiffs' evidence in the instant case indicates that the federal and state defendants share in instigating and preparing for the raid . . . The BPP was a black organization with a distinct political ideology and a variety of politically-oriented programs. FBI documents offered by plaintiffs demonstrate that certain FBI activities directed against the BPP transcended mere "law enforcement." . . . Without the information the federal defendants furnished the state defendants, the state defendants could not have acted in furtherance of the purpose which plaintiffs contend the state and federal defendants share—inflicting injury to the BPP . . . In granting the directed verdicts, the trial judge repeatedly usurped this [the jury's] function. . . . Despite their awareness of conflicting stories, Hanrahan, Jalovec, and the raiders continued to circulate reports to justify the continuation of plaintiffs' detention. . . . The evidence shows that a jury could find that Johnson's testimony before the grand jury was false and misleading and concealed the involvement of FBI headquarters and the roles of Piper, Mitchell, and O'Neal in the planning of the raid. . . . And during the pretrial discovery in this suit, the

> federal defendants continued to engage in dilatory and obstructive tactics to conceal evidence of their involvement in the planning of the raid. . . . His [Sadunas'] examination resulted in a crucial misidentification which would have remained uncorrected absent Zimmers' subsequent tests and conclusions. . . .

Because of the high esteem in which I hold my brother Swygert, it is with considerable regret that I feel compelled to observe that had I not had an acquaintanceship with the case as a member of the panel prior to reading Judge Swygert's opinion I could, upon the completion of the lengthy process of reading it, well have entertained the idea that the case involved a group of political idealists who had been subjected to a cleverly orchestrated governmental persecution designed not just to neutralize their effectiveness[1] but to remove them from the American scene physically. It is time, it seems to me, to look realistically at the group to which the local authorities directed their activities pursuant to a judicially authorized search warrant.

The state defendants have summarized from the record of this case the matters pertaining to the Black Panther Party which undoubtedly engaged the attention of law enforcement agencies. Because this factual information does not appear to be subject to

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[1] Whatever the situation may now be, or should be, it is doubtful that in 1969 attempts to discredit groups thought to be presenting a clear and present danger of violence was a violation of First Amendment rights.

challenge as to accuracy I note some of the salient aspects thereof.

The Black Panther Party was a militant, black, extremist, paramilitary, uniformed organization formed in Oakland, California in 1966. It was a violent, revolutionary organization, which by party edict required its members to own and know how to use weapons and to have access to more than one weapon. The Illinois Chapter of the Black Panther Party proclaimed that a class struggle in this country required the leadership of an armed revolutionary party, and that the Black Panther Party was simultaneously a military organization and political organization with leaders holding both military and political rank.

Black Panther publications called for killing policemen. The party's policy was that if at least one shot was not fired by a member being arrested, then the party would not stand behind that member. Black Panthers were called on to "revolt," "to arm themselves," to "dynamite," to "kill the pigs everywhere," to "not dissent from American government, we will overthrow it," and were admonished that "political power grows out of the barrel of a gun." Black Panthers published a "Destruction Kit" which described how to make and use incendiary bombs and other similar devices.

Much emphasis is placed in the record on the social service to the community provided by the Black Panther Party particularly with regard to their "Breakfast for Children Program." However, the record

also reflects that drawings were made on blackboards instructing children to "Kill the Pigs." At these breakfasts there was distributed a "Black Panther Coloring Book" depicting in cartoons pictures of children killing policemen. At one similar Black Panther Breakfast program the children were given revolutionary posters entitled "Free Huey, In Revolution One Lives and One Dies, and Off The Pig." A report concerning the FBI raid of Panther headquarters on Madison Street on June 4, 1969, reflects that the material seized therein included posters which advocated violent overthrow of the government, numerous weapons, both handguns and long guns including stolen weapons, and press releases promoting Panther propaganda. The Black Panther Publications during 1969 contained quotations of various of their leaders such as

> Huey P. Newton—When the people move for liberation, they must have the basic tool of liberation—the gun . . . The blood, sweat, tears and suffering of Black people are the foundation of the wealth and power of the United States of America. We were forced to build America, and if forced to we will tear it down. The immediate result of this destruction will be suffering and bloodshed. But the end result will be perpetual peace for all mankind.

In one exhibit there appears a description of a "Plan for the Complete Breakdown of the State of Illinois Power Structure." This plan documents the Panthers advocating the bombing and destruction of

buildings and public systems as well as the killing of government leaders.

There had been numerous shooting confrontations and clashes between the Black Panthers and police prior to December 4, 1969, both nationally and locally. Several policemen had been wounded and there had been shooting with Chicago police at the Black Panther Party headquarters a block from the apartment in question on July 31, 1969, and October 4, 1969. On November 13, 1969, two Chicago police officers were killed in a shootout with Spurgeon Jake Winters. Winters was killed in the incident and seven other Chicago police officers were wounded. The Black Panthers boasted of the killing of these police officers by Winters and claimed Winters as a member.

Hampton's own propensities as a leader in the Black Panther Party were evident from his proposal to murder a state trooper who was approaching his car stalled on a highway on a trip to Rockford, his conviction by a jury for robbery in May 1969, his kidnapping and torturing of a party member who is accused of stealing a Panther weapon, his use of weapons during a shootout of the Panthers with the Blackstone Rangers in Robbins, Illinois, and his oftenquoted statement, "If you kill one pig, you get a little satisfaction, if you kill some more pigs you get more satisfaction, if you kill all the pigs, you get complete satisfaction." Others of the plaintiffs who were at the apartment in question had criminal records and all had familiarity with handling firearms.

Finally, on the matter of the Black Panthers being a political party it must be remembered that the nine people who occupied this relatively small apartment on the morning in question were in the midst of a private arsenal consisting of 19 unregistered weapons, including 12 shotguns and rifles, among which were a stolen Chicago Police Department riot gun and 2 sawed-off shotguns, 7 handguns and several hundred rounds of ammunition. The occupants were not without knowledge in the use of the weapons and were members of an organization that advocated use of the weapons when a confrontation with police was involved.

This brings me to a final difficulty in placing this case in a proper perspective and that is the role of martyrdom in which many now regard Hampton and Clark. Irrespective of whether that shroud of martyrdom is misconceived, I cannot imagine that prior to December 4, 1969, this posthumously acquired respectability would have been accorded by many persons, either black or white, other than those subscribing to ochlocracy even though many persons, both black and white supported the goal of equal recognition and treatment for black people. The emotionalism of the plaintiffs' sinister conspiracy presentation should not obliterate the fact that there were ample grounds for regarding Hampton and those in the apartment with him as law violators.

Perhaps this is not in keeping with the time in which we live, but I cannot believe simply because

a minority group, even one composed of people who have been rather consistently repressed and denied equal treatment before the law, calls itself a political party and espouses a commendable purpose, that there is created some sort of an irrebuttable presumption that it is above the law, or that it can accomplish its goals by violence or other illegal means.

In saying the above I am not ignoring the fact that in our system of jurisprudence every law violator is guaranteed the full scale of rights provided for by law, including the constitution, statutes, and case law. I am simply endeavoring to put this case into the perspective in which it clearly was viewed by law enforcement officials in 1969, that there was a group of people who were dangerous to the law-abiding citizens of the community. Also, this case concerns itself with the Black Panther Party as it existed and functioned in 1969 and what its subsequent direction or conduct may have been is immaterial.

Turning then to my views on the disposition of the various components of this case, as I have already indicated, I concur in the relatively limited portions of Judge Swygert's opinion in which the judgment of the district court was affirmed.

Judge Swygert's opinion directs that sanctions should be imposed, pursuant to Fed. R. Civ. P. 37 (b)(2), against the federal defendants and counsel representing them at the first trial for repeatedly disobeying court orders to produce documentary material. I do not agree with the premise. This was a

trial in which the judge told the jury on the first day that it would last many weeks, "possibly as much as three months," but which in fact continued some six times that long. The district judge was on a day-by-day basis aware of the extreme difficulties of complying with the every-nook-and-cranny discovery demands of the plaintiffs, was in an excellent position to gauge the good faith of the defense efforts to comply with those orders, and also knew that these government files were not at the beck and call of former employees, were monumental in nature, contained much information not pertinent to the present lawsuit but which involved national security and which in any event was duplicative of that which had already been furnished. I cannot believe that this respected trial judge, who for the most part patiently continued presiding over a trial that was stretching beyond the wildest preliminary estimates, would have, in the words of Judge Swygert, "repeatedly exonerated the federal defendants," if in his position to observe there had been reason to support Judge Swygert's basis for sanctions that the federal defendants, other than O'Neal and their counsel "deliberately impeded discovery and actively obstructed the judicial process." It flies in the face of reason to think that the judge would not have reacted promptly to any defense obstructionist tactics which were further lengthening the time of this tediously long trial.

For these reasons I would see no necessity for the imposition of sanctions. Nevertheless, because the

case is going back and so that the mandate of this court is clear, I will join Chief Judge Fairchild with regard to a direction to the district court to giving consideration to the matter, rather than requiring it to impose sanctions.

There is one other matter not mentioned in Judge Swygert's opinion to which the district judge on remand might properly give some attention. As one reads Judge Swygert's summary of the seventeen counts of the amended complaint, of which twelve will remain viable as to most defendants on remand, it seems rather obvious that the plaintiffs were fractionalizing what was at most five basic issues, possibly following the school of thought that a shotgun charge is more likely to hit something than would a rifle bullet. The federal jurisdictional issues, four in number, as I see them, allegedly arise from (1) the raid, (2) the conspiracy concerning the raid, (3) the post-raid activities of obstruction and malicious prosecution, and (4) the conspiracy regarding the post-raid activities. All of these have the common underpinning of claimed violations of constitutional rights and the post-Civil War civil rights statutes. The fifth issue would concern the pendent state jurisdictional claims.

It is true that Rule 8(e)(2), Fed. R. Civ. P., permits the statement of separate counts which here would seem to be utilized to the maximum. On the other hand, it would seem to me that the new trial judge pursuant to Rule 16 could use pre-trial proce-

dure to good effect to accomplish a fundamental simplification of the issues as an aid to the jury's comprehension of what was involved. Although Rule 16 speaks of the pre-trial order limiting the issues for trial to those not disposed of by admissions or agreements of counsel, "it has been pointed out that that is an understatement, since the pre-trial judge does not merely eliminate uncontroversial issues but also formulates the remaining issues to show the real contentions of the parties." (Footnote omitted.) 3 Moore's Federal Practice ¶ 16.18 at 1129 (1978). As another text has stated, "Rule 16 calls for a pretrial conference, which can produce a pretrial order that supersedes the pleadings, ..." 5 Wright and Miller, Federal Practice and Procedure, § 1189 at 28 (1969).

Perhaps a simplification of the issues would also help avoid a repeat performance of the same length.

Turning then to the various issues as applicable to the various defendants, I will first treat the situation as to the remaining thirteen policemen and their liability herein insofar as the raid is concerned. It appears necessary here to consider separately the actual activity of the raid and the conspiracy and likewise consider separately the shooters and nonshooters. In my opinion a directed verdict was proper on all aspects of the raid itself and the conspiracy with regard to the shooters with the possible exception of Groth.

Relying on *Byrd* v. *Brishke*, 466 F.2d 6 (7th Cir. 1972), Judge Swygert's opinion holds that the di-

rected verdicts in favor of the nonshooters regarding their activities in the raid were improperly granted by the trial court. As indicated, I disagree. The holding of impropriety is based upon the factual premise that the nonshooters were in the apartment at the time the occupants were being mistreated and did nothing to protect them. In my view, there is no need to reach the *Byrd* question as there appears to me to be a complete lack of proof of the factual premise stated above. The Hampton plaintiffs' brief does not touch at all upon this matter. The Anderson plaintiffs' brief in its argument portion, relying upon a case of gross negligence, stated with regard to the nonshooters only the following, "Similarly culpable is the conduct of the raiders who did nothing to stop the use of excessive force, or the beating and mistreatment which followed. *See Byrd* v. *Brishke*, 466 F.2d 6 [7th Cir. 1972]." In the Summary of Evidence portion of their brief, after describing in two paragraphs, with frequent transcript citations, the mistreatment of the occupants following the shooting, the brief then contained the following which is the first reference to the presence of the nonshooters:

> All 14 raiding police officers were present inside the apartment during the beatings and abuse, participated in them and did nothing to try to stop them. FRED HAMPTON was still lying unattended on the floor in the dining room. All 14 police officers then ransacked the apartment, turning beds and dressers over and emptying their contents throughout the apartment, and

> destroying and mutiliating evidence of what had occurred. [Pl #553 PL. 410 1SSGJ84-5] All 14 police officers saw FRED HAMPTON lying on the floor with blood coming from his head, but none did anything to try to determine if he was alive and could be helped. At no time did any of the officers seek to determine the nature of Plaintiffs' injuries, or to assist or protect them in any way.

There is no reference at all to any portion of the transcript of the evidence with regard to any nonshooter officer even being in the apartment. The only two citations at all to the record are to Plaintiffs' Exhibits 553 and 410. Exhibit 553 is a photograph showing no people but showing drawers out of a dresser, clothing on the floor, and beds turned over. Exhibit 410 is a partial transcript of testimony by nonshooter defendant Lynwood Harris. Three of the pages, 77, 78, and 203 appear to be from a deposition of Harris and the balance of the pages are from his appearance before the grand jury at the time Barnabas Sears was appearing as the special prosecutor. This exhibit is somewhat difficult to read because of its disjointed nature, it being only a part of a complete transcript. The exhibit was 33 pages of the grand jury testimony but the first page of the exhibit is numbered 57 and the last 157. It is clear, however, that it contains no evidence of any of the outside nonshooters going into the apartment immediately following the shooting. Harris apparently did go in at some later time when the firearms were be-

ing laid out on a mattress. At the time of the shooting he heard the noise of the shots. When asked what happened next after he heard the second round of shooting, Harris, *who was not in uniform at the raid*, responded:

> Well, actually from that point on, I was really concerned with myself because cars were beginning to arrive in response to the policeman's call. And I was concerned in letting those officers arriving know that I was a police officer standing here. And this was a constant cry by me, police officer.

While Harris subsequently was asked "who else was there other than the fourteen State's Attorney's Police Officers, when you got back to the apartment?" he mentioned officers from other units, a photographer, an evidence technician and other officers making sketches. The question does not, of course, confine the 14 officers to the inside or outside of the apartment and obviously, in any event, the time referred to is obviously after the occupants had been removed when Lynwood Harris, himself, was helping by carrying out some of the firearms. When the raiders went inside, it was understandable in this neighborhood that others would be posted outside to prevent interference with the operation. The continuance of that guard duty clearly would have become more important after the actual shooting. In sum, I find no basis for even an inference that the nonshooters were inside when any occupant of the apartment was al-

legedly mistreated, and certainly not to support the inference suggested in Judge Swygert's opinion that they "callously chose to watch."

I must assume that the plaintiffs' counsel have advised us of all of their record support for their assertion that all fourteen officers were inside and certainly this court is under no duty to search 37,000 pages of transcripts plus voluminous documents to see if there is some other reference to any of the nonshooters being present in the apartment before the occupants had been removed.[2]

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[2] A footnote has been added to Judge Swygert's opinion with regard to the point in my dissent that the nonshooters were entitled to a directed verdict because they were not even in the apartment at the time the plaintiffs claim the occupants were mistreated. I attempted to make it clear that I assumed that plaintiffs' counsel would give us all of the record support available to demonstrate the presence of the nonshooters in the apartment at the time in question and that upon analysis they gave no such support. Judge Swygert's added footnote, however, refers to other items of evidence on the question.

I see no reason, however, for receding from the position I took on this issue in my dissent. Judge Swygert's added footnote gives significance to there being fifteen or twenty officers in the kitchen some of them being in police uniforms. If the number was twenty, this, of course, was six more officers than were in the raiding party and would seem to indicate that the presence in the kitchen related to a time substantially subsequent to the cessation of the shooting when other officers had answered the call. Further, Officer Harris at least, upon whom the Anderson plaintiffs rested the matter, was in plain clothes although a nonshooter. The fact that two of the nonshooters *entered* the apartment at or about the time of the shooting, if that indeed is a fact, does not place them there at the time of the alleged mistreatment of any of the

Even if we were to assume arguendo that some of the nonshooters were present when an occupant was mistreated, on the record we have here, I would not find *Byrd* applicable. That case on which I was a member of the panel, and the opinion of which was authored by Judge Swygert, reversed a judgment based upon a directed verdict which reversal was predicated upon the fact that the jury could have found nonfeasance, either negligent or intentional, on the part of officers of a particularly egregious nature. In the later case of *Bonner* v. *Coughlin*, 545 F.2d 565 (7th Cir. 1976), negligence was eliminated from the picture. In that case, the plaintiff relied upon *Byrd*, and in the en banc opinion written by Judge Cummings, Judge Swygert dissenting, the significance of *Byrd* was circumscribed to "purposeful nonfeasance." *Id.* at 568. "Thus defendants' failure to act in *Byrd* can be properly characterized as 'intentional.'" *Id.* at 569. I find absolutely no basis for a viable claim of proof of purposeful nonfeasance on the part of the nonshooters.

As to the conspiracy count pertaining to the raid insofar as the nonshooters are concerned, even if we were to assume that the sinister conspiracy with the object of using excessive force and killing some of the occupants existed among the federal defendants

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occupants. While this is a situation in which reasonable inferences are permitted to be drawn, there should be something more than Judge Swygert's added footnote demonstrates to say that there was something to go to the jury on the matter of purposeful nonfeasance on the part of any of the nonshooters.

and the higher-ups of the state defendants, I find no basis for saying that the nonshooters, and indeed the shooters with the possible exception of Groth, were a part of the conspiracy. If there had been such a conspiracy, these men, five of whom including three of the shooters being black, were not doing anything except pursuing the often unhappy lot of a policeman of carrying out orders of superiors. Lynwood Harris, for example, found out he was to go on a raid when he left work the evening before. He reported at 3:45 a.m. and he along with the others was given an assignment by Groth. They were simply carrying out their duty of serving a judicially issued search warrant. If subsequent to learning that this might be a very dangerous assignment involving a local leader of the Blank Panther Party, while it might not be surprising if those entering the premises overreacted in view of the knowledge that they were entering as "pigs," some of their colleagues having been allegedly killed by a Black Panther Party member, the fact of the subsequent overreaction would not bear upon the existence of a conspiracy on their part.

At this point, it is appropriate to refer to one point of emphasis both on the part of the plaintiffs and in Judge Swygert's opinion with regard to the existence of a conspiracy and this is applicable to all of the defendants who are charged with conspiracy in connection with the raid. That point was that Groth planned the raid for 4:00 a.m. and there was no discussion of the use of tear gas, sound equipment, bull horns, or of any equipment besides guns; and that

there was no discussion of alternative ways of gaining entry to the apartment, including telephoning the occupants.

To anyone with a realistic regard to the circumstances existing at the time it might seem unnecessary to point out the foolishness of these various proposed alternatives if the purpose of serving a particular warrant was to search for and seize an arsenal of illegal weapons in a probably unfriendly neighborhood and to arrest those who were found to be possessors of those weapons. Nevertheless, because the nature of the raid has been given significance, it is necessary to analyze the existing situation.

In settling upon the early morning hour as the appropriate time for making the raid, Groth, as the commanding officer of the group, complied with Illinois law which provided that a search warrant may be served at any time of the day or night. § 108-13, Ill.Rev.Stat. Ch. 38 (1969). As the state defendants point out the key factor in that decision was to surprise the occupants while hopefully they would be asleep, thus avoiding, if possible, any use of force or resistance, and that the possessors of those illegal weapons would most likely be present subject to arrest at the early morning hour. The apartment was located in a residential area and police arriving in any force at the scene during a daylight hour, even during working time, would attract a crowd and in the event of any shooting the lives of nearby citizens would be in danger.

The police had a right to anticipate the possibility that the guns in the apartment might be used against them particularly in view of the well-known attitude of the Black Panther Party on the subject of the dispensability of policemen.

As the Supreme Court stated in *Terry* v. *Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968):

> Certainly it would be unreasonable to require that police officers take unnecessary risks in their performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

One of the occupants, Anderson, indeed said that he was searching trying to find his shotgun which he had loaded before going to bed with deer slugs and .00 shells and the pistol which he had loaded and placed between the beds, but he could not find them because there was shooting although he would have used them had he found them.

To have gone to the apartment in the early evening of December 3 might well have attracted reinforcements from the Panther Party headquarters only a short distance away. During daylight hours snipers could reasonably be anticipated from the buildings in the area. To have brought equipment such as bullhorns or to have telephoned the occupants or to have thrown strong searchlights on the apartment and ordered the occupants to come out could have reason-

ably been anticipated to precipitate a battle royal. The use of tear gas at this point might have been appropriate if the battle royal had policemen shooting from the outside and Black Panther Party members shooting from the inside. To have used it as an initial matter, however, would have given the real possibility of other types of damage to the occupants. Expert testimony in this trial was that tear gas should be avoided in residential districts such as this one. Further, it is noted that gas masks were reported to be stored at the apartment which would have been effective against the use of tear gas by the police. A telephoning or other type of communication would only have given the occupants time to set up their counter-attack and the time to fire the weapons which the plaintiffs contend were never fired. To have used bullhorns, spotlights, or loud speakers in this residential area would have only exacerbated the situation by attracting crowds and thereby exposing more persons to a potentially dangerous situation.

One only has to recall the gun battle occurring when the police were involved with the Symbionese Liberation Army in Los Angeles a few years ago to realize that the police chose a wise and prudent course in attempting to serve their warrant by way of surprise when the purpose of seizing the weapons could be accomplished with the least likelihood of harm to anyone. As to why this did not go as planned will ultimately apparently have to be determined by a jury but there seems to be little dispute that some-

one fired a shot and thereafter the shooting inside the apartment occurred rapidly. All of this, however, does not negative the fact that the timing and manner of the raid was prudently planned as opposed to all alternatives and the timing of the raid and carrying of the weapons are, in my opinion, no evidence whatsoever of the existence of a conspiracy.

Turning next to the shooters, what I have said with regard to the conspiracy as to the raid itself is applicable to them with, as I have previously indicated, the possible exception of Groth. If there was such a sinister conspiracy, or putting it in the context of this case, if there was evidence in the case sufficient to require the conspiracy-raid issue to go to the jury, then the jury should also have the opportunity of deciding whether he was a party to the conspiracy. As will be indicated hereinafter I do not think there was a jury issue developed.

With regard to the non-conspiracy raid activity case against the shooters, the state defendants' brief presents a persuasive case to the effect that these officers who were acting pursuant to a judicial warrant did not fire a weapon until there had been firing at them. It seems fairly certain that some of the officers who went in, negligently thought that the occupants were firing at them and thereupon returned the fire. This could well result in a jury verdict for some of the shooting officers and against others. Insofar as the case before us is concerned, however, there is testimony from which a jury could reasonably find that the shooters overreacted and used ex-

cessive force. *See Davis* v. *Freels*, 583 F.2d 337 (7th Cir. 1978). Where evidence is to be weighed, that is not the function of this court but that of the trial court trier of fact. I think the district judge, although understandably satiated with this long drawn-out trial which was not going to come to final decision because of a hung jury, mistakenly directed a verdict on the raid issue as to the shooting officers.

Going next to the conspiracy-raid issue as to the remaining state defendants and the federal defendants, I cannot agree that there was a basis for reasonable inferences that there was any kind of an agreement among them, express or implicit, to cause a raid to be made with the object of killing or wounding various Black Panther Party members. It is true that at the time in question, the federal authorities thought it would be in the public good to neutralize the Black Panther Party so that it could not carry out its avowed purpose, among others, of killing policemen. Indeed, the idea perhaps could have been entertained by some, if not all, of those defendants who were engaged in law enforcement work that the community would be a safer place for law-abiding citizens to live and work in if Fred Hampton and his cohorts were not on the scene. This human feeling is far removed from a basis for an inference that they deliberately set a course to accomplish that by violence.

In our jurisprudence a person cannot be convicted of a traffic offense unless proven guilty beyond a reasonable doubt. Even though the present case is of the

civil variety, I cannot believe that the law should permit a determination that any person has deliberately planned a homicide on nothing more than speculative conjecture or mere suspicion. The hard basic reasonable inference-creating facts just did not exist in this case.

What I have said about the conspiracy-raid is also applicable to the non-conspiracy counts concerning the planning and participation in the raid by the federal defendants and the state defendants. The shooters, as I have previously indicated, remain in the case not because they planned a raid with the objective of attempted homicide, but because of the excessive force question. As I have stated previously I do not regard the carrying of the firearms or the time and manner of the raid as being the basis of an inference of a plan to use excessive force.

An aspect that is directly involved in the result of the decision in this appeal is, in my opinion, a potentially disastrous curtailment on necessary exchanges of information between law enforcement and agencies. The rising need for effective law enforcement cannot but be substantially chilled if there should be the prospect of becoming a defendant in a suit for monetary damages whenever information concerning law violations is communicated by one agency or official to another agency or official having primary jurisdiction over the crime.

At this point in the preparation of this dissent, I have become confronted with an increasingly compelling necessity to turn to other cases of this court

with which I am concerned, many of which have statutory priority over this civil case; notwithstanding Judge Swygert's concluding admonition that upon remand this case should be given "high priority." I have not requested, nor have I been given, a respite from a full calendar of sitting accompanied as that must be by the necessity of preparing opinions or orders on at least one-third of the cases on which I have sat. Therefore, while not doing so happily because of my belief that sending virtually the complete case back for another extended trial constitutes a miscarriage of justice and a misuse of the federal judicial facilities, I will endeavor simply to outline as briefly as possible my remaining observations on this case.[3]

1. *Post-raid prosecutorial matters.* An initial difficulty for the plaintiffs here is that the occupants were in possession of illegal firearms and were subject to prosecution. In any event, under *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), most of the post-raid direct prosecutorial activities of the state's attorney and his as-

[3] The incentive toward continuing a fuller discussion is not encouraged by the realities of the situation being that there is very little probability this case will not go back for retrial. Two of the active judges of this court (Judges Bauer and Wood) have disqualified themselves, two more, of course, are in the majority of the present panel, and all four of the remaining would have to vote to rehear the case *en banc*. Insofar as the Supreme Court of the United States is concerned, the small percentage of the heavy volume of petitions for certiorari which can be granted minimizes the likelihood in any case of being successful in the pursuit of certiorari.

sistants provided to them absolute immunity from civil liability. It is true that the *Imbler* Court expressly left open the question of whether absolute immunity extended to a prosecutor in the role of an administrator or investigative officer rather than an advocate. Here charges were being made following the raid that the police and Hanrahan were guilty of murder and genocide. Demonstrations occurred and there was tension in the community. Under these circumstances it appears to me to have been well within the prosecutorial authority and duty of this public official charged with the enforcement of the criminal law in his county to take the steps that he did in defense of the system of law administration. Hanrahan's concept of this duty was thus stated:

> I had a public responsibility as the chief prosecuting officer in Cook County to do everything possible to preserve the peace and to prevent an outbreak of violence. I saw that coming as a result of what I described as the press orgy, the accusations of murder and unlawful conduct, and I did not feel that there had been clear and accurate reporting of the accounts given by the officers.

Vociferous denunciations of the police conduct by those supporting the Panthers, as an aftermath of the raid does not mean that Hanrahan was not entitled to believe those who were involved in the law enforcement activities of the county. It appears to be a frequent practice today when steps are taken to enforce the law that the one charged attempts to di-

vert attention from his own malfeasance by asserting that his constitutional rights have been violated.

The involvement here in public statements and media publicity was of a far less egregious nature than that which has been involved in cases of absolute immunity where prosecutors were engaged directly in the prosecutorial process. The conduct here was so intimately interrelated with the prosecutorial process that it should have the same protection. As the Court pointed out in *Imbler*, at 425, 96 S.Ct. at 992, "Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." That is what has happened here in my opinion, and, again quoting the Court, at 426, 96 S.Ct. at 993, "The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." In the present case, the counterattack to the publicity was for the purpose of avoiding such an adverse effect.

It is the state authorities who prosecute, and irrespective of whether the federal defendants may have thought prosecution was proper, I fail to see a jury case of malicious prosecution against them. One, of course, does not have to be in the prosecutor's office to be chargeable with malicious prosecution but he should have some connection with bringing about the wrongful prosecution more than just thinking that the defendant should be prosecuted.

2. *Claimed obstructionism.* Under my view the matter of the raid would only remain in litigation as to the shooters. Without the issue of conspiracy as to the raid, the post-hoc claimed acts of obstructionism, upon which the Anderson plaintiffs particularly rely, have not been, it seems to me, demonstrated to have harmed the plaintiffs. As Chief Judge Fairchild has pointed out in his concurrence, it seems clear that plaintiffs cannot recover damages for injury to reputation, without more. If the defendants have engaged in the obstruction of justice or perjury the criminal courts not this civil suit are the proper place for their consideration.

Indeed, the history of criminal proceedings in the area with which we are concerned during the past decade testifies to the fact that high office or powerful position does not provide a shield against successful prosecution for violations of the law.

I find it almost incredible that Sadunas, who made a mistake in identifying one of many guns he examined from which a shell had been fired, is being left in the case. This is particularly true because he is paying a penalty for honesty by promptly acknowledging his mistake when he made a reexamination and because this is not a case of a rifle or pistol cartridge where the rifling in the barrel gives a much more distinctive basis for identification than in the shotgun shell casing here involved.

Other charges of obstructionism upon which the plaintiffs rely amount to nothing more than nonfeasance, or failure to act.

Again, the fragmentation of the complaints creates difficulties. These matters are all interrelated and when they are viewed in the light of a nonsupportable claim of conspiracy as to the raid, the prosecutorial immunity, the nonexistence of claims based upon mere negligence, the existence of law violations in the illegal possession of firearms and the fact that the plaintiffs who were offered an opportunity to appear and participate in the post-raid investigations declined to do so, I find no merit in the claim that the charged obstructionism was the basis for an action against the defendants.

3. *Groth's informant.* I must confess that I fail to comprehend the considerable emphasis given to this matter. I have no idea whether Groth did or did not have his own informant; but I cannot agree with Judge Swygert's conclusion that the lack of or unreliability of the informant, or the furnishing of incorrect information by the informant, would, on the facts of this case, place the search warrant in any serious jeopardy. I do know that a knowledgeable and reliable informant known to be such to a law officer provided information which was passed through a reliable chain of law enforcement officers into an application for a search warrant and the information so furnished was correct. And it was on this judicially issued search warrant that the police officers acted as they had to do.

At one point in their brief, the Anderson plaintiffs say they are seeking to learn the identity of the informant in order to "try and find" evidence of il-

legality. Mere speculation or suspicion that an informant might be of some assistance should not be sufficient to overcome the public interest in the protection of an informant's identity.

The matter of protecting the identity of a confidential informant, in my opinion, is one of extreme importance in law enforcement. Perhaps if this were the best of all worlds, spying would not be tolerated because there would be no place for it. The said fact, however, is that this is not the best of all worlds and crime, whether it is caused by poverty, economic inequality, psychological maladjustment, or other causes for which society may be responsible, does continue to exist, and at the present moment appears in no way to be declining. Particularly with regard to those who have consciously embarked upon a criminal career, one of the most effective ways of learning of their activities and curtailing them is through the use of confidential informants.

I would let the matter rest upon the determination of Judge Perry, who had the opportunity to see and evaluate Groth's credibility. The fact that Groth declined to reveal the informant's identity to Judge Perry in camera is a strong indication of the truth of his assertion that the informant's life would be endangered by his identification. O'Neal's identity could be revealed even though his usefulness as an informant was thereby ended because he was no longer associated with the Black Panther Party. There is ample basis for belief that if Groth's informant were

still in such an association he would be in a position of retributive jeopardy.

I cannot conceive that the scope of our appellate review is such as to permit us to conclude, as Judge Swygert's opinion does, that upon remand the identity of the informer must be disclosed. The matter, if it really is of significance, which I doubt on the facts of this case, should be reexamined carefully in the light of *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). By this court deciding as a matter of law that the identity of the informer is not entitled to protection, we are deciding a factual matter in much the same way as that which the majority faults Judge Perry for doing.

4. *Discovery matters.* I have already earlier in this dissent expressed my views on this subject. This was not in trite parlance "a fine-tooth-comb" operation but was a time-wasting and harassing "fishing expedition."

5. *Evidentiary rulings.* I find no basis for a reversal in this respect. The Anderson plaintiffs' claims for the most part relate either to instances where the judge sustained objections to improper questions, barred testimony on an irrelevant area, made non-damaging comments or clarifying remarks to the jury, explained the pertinent law or himself asked questions of the witness, all of which were well within his discretion. *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-08 (2d Cir. 1972), *cert. denied*, 411 U.S. 918, 93 S.Ct. 1556, 36 L.Ed.2d 310 (1973); *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.

1960), *cert. denied*, 364 U.S. 824, 81 S.Ct. 59, 5 L.Ed 2d 52.

Insofar as the complaints of the Anderson plaintiffs that Judge Perry disparaged their evidence or that he engaged in acrimonious exchanges with their lawyers are concerned, I regard these as nothing more than instances in which the judge either lamented the irrelevant and repetitive nature of appellants' counsel's questions, instructed the jury on a relevant point of law, or aptly described improper questions by plaintiffs' counsel.

The exchanges which did occur between court and counsel were, it appears to me, the result of repeated improper questioning and, on the whole, resulted from the rude and insulting behavior on the part of the Anderson plaintiffs' lawyers. Thus, frequently, counsel would persist in asking improper questions, in interrupting, in making improper statements in front of the jury, and in continuing to argue and object after the judge had made a ruling. It is well settled that the judge may admonish counsel for unnecessary and improper questions or for failing to comply with the rules of the court. *Miley* v. *Delta Marine Drilling Co.*, 473 F.2d 856, 857 (5th Cir. 1973), *cert. denied*, 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1974); *United States* v. *Glaziou*, 402 F.2d 8, 17 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969); *Pacific Coast Cheese, Inc.* v. *Wirtz*, 314 F.2d 145, 148 (9th Cir. 1963), and the judge did nothing more than that here.

As the court stated in *Volkswagen Interamericana, S.A.* v. *Rohlsen*, 360 F.2d 437, 445 (1st Cir. 1966), *cert. denied*, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143:

> It is inappropriate for counsel to complain of treatment that he has invited, particularly when that treatment is well within responsive limits. We have said before, and we repeat, such claims should not be made at all unless they are very sound. The proposition that counsel can disregard the court's instructions, obtain a rebuke, and then preserve the incident as insurance in the event the case is lost, does not sit well.

It appears to me that Judge Perry displayed wisdom and patience in a vigorously contested case with contentious counsel and that his rulings followed the governing rules of evidence, producing a fair trial for the plaintiffs.

6. *The Contempts.* The authority of a federal judge to punish summarily for conduct constituting contempt committed "in the actual presence of court" as well as the procedure to be followed, is established by Rule 42(a) of the Rules of Criminal Procedure. Rule 42(a) reads:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

The authority to punish summarily applies to behavior of counsel. *Sacher* v. *United States*, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952). *See also United States* v. *Wilson*, 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed.2d 186 (1975). In *Sacher* the issue arose from a nine month trial, one-half the length of the present case. During the *Sacher* trial defense counsel, in the presence of the trial judge and in the face of repeated warnings from him that their conduct was regarded as contemptuous, persisted in a course of conduct that was highly contemptuous and that tended to disrupt and delay the trial and possibly to cause a mistrial. Upon receiving the verdict of the jury at the conclusion of the trial, the trial judge, without further notice or hearing, immediately filed a certificate under Rule 42(a) of the Federal Rules of Criminal Procedure summarily finding such counsel guilty of criminal contempt and sentencing them to imprisonment.

The decisive issue in the *Sacher* case was whether Rule 42(a) applied at the end of the case. Of significance to the present case is the fact that the Court in *Sacher* took it as conceded that there was no substantial issue when, as in the present case, the judge acted promptly. By way of summary, the Supreme Court stated at 13-14, 72 S.Ct. at 457:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advo-

> cate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

It is clear in the present case that Judge Perry properly followed the procedures set forth in Rule 42(a). The conduct clearly was not committed outside "the actual presence of the court" nor is it contended that the judge did not see or hear such conduct. Also, the judge promptly signed and entered an order reciting the facts.

It is to be noted before taking up the individual contempt orders that both Haas and Taylor were counsel for the Anderson plaintiffs.

Taking up the Haas incident first, this incident developed very shortly after Haas had been reprimanded for directing a derogatory statement towards the judge. Thereafter, the jury was excused because of argument regarding the propriety of a question. When the jury returned the judge struck the last question and told the jury to disregard it. Haas resumed his examination of Hanrahan and upon objection the judge told Haas that they had just gotten through that out of the presence of the jury and "you will not go into that subject matter any further." Haas responded that he did not even get to argue it and the court repeated, "I said you will not go into it any further."

Upon this Haas responded, "Judge, we can't cover up the cover-up." Haas continued that that was part

of their complaint, that they covered up. The judge immediately held him in contempt of court. All of the above was in the presence of the jury. After the jury retired Haas continued:

> All right, Judge. I think all the people who have spoken the truth have always ended up in contempt, and the cover-up goes on and on and on.

It appears obvious to me, as it must have to the jury, that Haas in his first statement about a cover-up was not referring to something which had happened back in the early 1970's but was referring to the court participating in a further cover-up. His meaning was made clear by his subsequent statement that the cover-up goes on and on and on. A charge in the presence of the jury that the presiding judge is participating in a "cover-up" is particularly damaging during the course of a trial. On the one hand the jury may come to the conclusion that the judge thinks there is no merit in the answer which counsel is attempting to elicit and therefore he is curtailing the pursuit. On the other hand, the jury may think just the opposite, i.e., that the trial judge is improperly covering up for the defense, in which case the judge's necessary authority in further trial matters such as instructions is diminished. In either event a fair trial is hampered.

A charge that the trial judge engaged in a cover-up made in the presence of the jury is clearly an affront to the court and disruptive to the administra-

tion of justice and the order of contempt as to Haas should be affirmed. *See United States* v. *Wilson, supra; United States* v. *Sacher, supra.*

The case as to Taylor is closer although possibly with some significance it was Haas who was examining the witness but it was Taylor who engaged in the conduct charged as being contemptuous. The case is closer because it simply should not have occurred in the first place. This all began because defense counsel objected to a question which included the word "raid" and said that the defendants had never entered into a stipulation using that word. He accused Haas of a "deliberate, willful, and intentional intent to prejudice the jury." The defense was incorrect because the word "raid" had been used in the stipulation and indeed I am at a loss as to why this type of objection would have been made as there could be little doubt in my mind, and I have so characterized it herein, that the service of the search warrant on the morning of December 4, 1969, was a raid within the common dictionary definition of that word. The situation no doubt became more distressing to plaintiff's counsel when the judge told the jury that Haas had deliberately and willfully misread a statement and subsequently, after a transcript had been obtained, did not upon the request of Haas advise the jury that Haas' statement was not a misrepresentation.

At this point Taylor for some reason got into the act and as he slapped papers on the table his hand knocked off the pitcher which broke onto the floor.

The glass lining of the pitcher was broken. In dealing with this incident in the Anderson plaintiffs' brief, typical of the hyperbole throughout the brief was the reference to defense counsel's bringing to the attention of the judge that a water pitcher was broken which caused the brief writer to characterize the defense counsel as "the snitch."

The appellants' brief concedes the judge's action finally got them good and mad by refusing to hear them and that they returned to their table flinging down their papers in anger and frustration. At a further point the brief indicates that, "Taylor, by contrast, gave the judge grist for his mill, by letting him get his goat, to mix metaphors. In a case without such pervasive bias and unremitting provocation by the Court, some rebuke might arise on such a gesture. . . ."

I have no reason for believing that Taylor deliberately knocked the pitcher off onto the floor. On the other hand one cannot safely predict the consequences of uncontrolled anger which should not occur, or at least which should not be exhibited in the courtroom by counsel.

Under all of the circumstances, I would affirm the contempt orders as to both Taylor and Haas.

7. *Other contentions and issues.* Judge Swygert's opinion correctly holds that the matter of whether plaintiffs should recover attorneys' fees must be deferred until the final outcome of the litigation but does allow such fees for the appellate work. Because of my position on the merits of the appeal I would

only allow the appellate work fees commensurate with the work involving the shooter defendants which would be the full reasonable amount for the Hampton plaintiffs but which would be substantially curtailed for the Anderson plaintiffs.

Judge Swygert's opinion also directs the district court judge to whom the case is reassigned on remand "to give the retrial high priority." I assume that this can only mean all possible priority and that we are not directing the district court to disregard the numerous types of litigation which might have statutory priority over this civil suit. I should think, for example, that cases under the so-called Speedy Trial Act would have precedence over the instant litigation.

Because of the multiplicity of the claimed errors, at least in the Anderson plaintiffs' briefs, it is somewhat difficult to be sure that all significant claims have been addressed. I am not aware, however, of any, including any of the various elaborating fragmentations, which cause me to think that a new trial is indicated as to any of the defendants except to the extent herein indicated.

8. *Conclusion.* It has not been a happy task to disagree to the extent to which I have felt compelled with the opinion of an esteemed brother judge but I consider that this case has important overtones of unbridled denigrating attacks on governmental officials. I hope I have made it clear that I do not entertain the idea that government officials should not have to answer in some forum for abuse of power.

I would agree that, individual governmental officials who do not have absolute immunity should anticipate that they will be held accountable for monetary damages to those whom they have injured when they have discharged their duties of office in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. The result would be the same where the actions were manifestly beyond their line of duty.[4]

I am saying, however, that a wide-ranging witch-hunting type of assault on public servants across the board should receive the most careful judicial attention.[5] I don't think the present case can withstand that scrutiny, the focus of which must be on the situation as it existed at the time of the events in question.

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[4] Nor, I should add, do I intend anything said herein to minimize the importance of lawyers accepting unpopular civil cases. Accepting such employment often requires a solid exercise of courage, but I regard doing so as one of the obligations assumed by a person who has been admitted to the practice of law.

[5] The pendulum has taken a far swing from the days of McCarthyism but the extremes of the swing seem to me to be equally undesirable for the good of the country. Unfortunately many who decried the excesses of McCarthyism do not seem equally concerned by the development of the extremity of present day witch-hunting directed toward law enforcement officials.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 12, 1979

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

Nos. 77-1698, 77-1210, and 77-1370

IBERIA HAMPTON, ET AL., PLAINTIFFS-APPELLANTS

vs.

EDWARD HANRAHAN, ET AL., DEFENDANTS-APPELLEES

ON PETITION FOR REHEARING

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-

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Judges Pell, Sprecher and Tone voted to grant rehearing *en banc* except as to the shooting policemen.

Judges William J. Bauer and Harlington Wood, Jr. have disqualified themselves from participating in this decision.

entitled cause by the defendants-appellees, a majority of the panel having voted to deny the petitions; and the *en banc* suggestions having failed to receive a majority of votes of those judges in active service who have not disqualified themselves,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
219 South Dearborn Street
Chicago, Illinois 60604

July 28, 1977

Chambers of
Senior Judge Joseph Sam Perry

Tel: 431-9400
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Mr. John P. Coghlan
111 W. Washington St.
Chicago, Ill. 60602

Re: IBERIA HAMPTON, ET AL.

vs.

EDWARD V. HANRAHAN, ET AL.

No. 70 C 1384

Gentlemen and Ms. Kwoka:

It is my intention to file a Memorandum sometime after the conclusion of the trial of the above entitled case. However, service of a Notice of Appeal precluded that action.

During the trial I kept notes. From those notes and the pleadings, orders and transcript of the proceedings I have prepared a Summary of the trial.

There are bound to be some discrepancies therein but the record can be referred to for further clarification.

Also, as you well know, the Federal defendants in early 1975 filed a motion to dismiss this cause of action as to them and counsel for the parties filed memoranda in support thereof and in opposition thereto. At first I was of the opinion the Federal defendants should be dismissed and prepared an order accordingly. It was never entered as I finally concluded the Federal defendants should remain as defendants in the case. The motion was taken under advisement and the Federal defendants ordered to answer. At the close of the case the motion of the Federal defendants motion to dismiss was renewed.

Because of the complexity of this case and the extensive documentation involved, I am of the opinion that copies of the Summary and unentered Order may help the attorneys for all parties in organizing their briefs for the appeal. The Summary has not been filed in this case and cannot be filed and is not intended by me to be an official Memorandum. Under separate cover I have had a copy of the Summary and unentered Order delivered to your offices.

I have delivered all *in camera* items that were held in my chambers' vault to the Clerk of the Court for inclusion in the record going to the Court of Appeals and you by this time should be in receipt of an order entered by me regarding this matter.

Attorneys for the parties have picked up most of their exhibits in this case but there are certain exhibits still remaining in my chambers' vault. Attor-

neys are requested to pick up these exhibits and representatives of all parties should be present at the time this is done in order to avoid any misunderstandings.

Very truly yours,

/s/ Joseph Sam Perry
JOSEPH SAM PERRY

JSP:rz

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 1384 (Consolidated)

IBERIA HAMPTON, ET AL., PLAINTIFFS

vs.

EDWARD V. HANRAHAN, ET AL., DEFENDANTS

SUMMARY

Trial of this case has been concluded after 18 months and 320 trial days. The trial is said to be the longest case tried to a jury in the history of the United States judiciary. The pages of the trial transcript alone numbers in excess of 37,000 pages.

This civil suit arose out of the serving of a search warrant for weapons by State's Attorney's police at an apartment occupied by nine members of the Illinois Chapter of the Black Panther Party. The plaintiffs alleged deprivation of their constitutional rights both during and following the occurrence and claimed damages under the Civil Rights Act and Illinois law.

The occurrence took place on or about 4:45 A.M. on December 4, 1969 at an apartment located at 2337 West Monroe Street, Chicago, Illinois, and resulted in the death of Fred Hampton, Chairman of the Black Panther Party in Illinois, and Mark Clark, and in the wounding and injury of four other members of the

Black Panther Party and two Chicago police officers. In the apartment police found and and [sic] seized 19 weapons, which had not been registered to plaintiffs, including one illegal sawed-off shotgun and one stolen police weapon, and nearly 2000 rounds of ammunition, some of which weapons were described in the Complaint for Search Warrant and the Warrant itself.

The instant case is a consolidation of four suits filed shortly after the occurrence and consolidated for all purposes on October 22, 1971. On October 4, 1974 plaintiffs filed an Amended and Consolidated Complaint of 116 pages comprising 17 counts. After extensive discovery, trial of this case began on January 5, 1976 before a jury and continued until June 20, 1977, almost 18 months later.

The Parties and The Allegations

In their Amended and Consolidated Complaint plaintiffs charged the defendants, while acting in their official capacities as Chicago policemen, State's Attorney's police and as Federal, State, County and City officials, planned an illegal "raid," caused the deaths of Fred Hampton and Mark Clark, caused serious bodily injury to four of the plaintiffs, and thereafter imprisoned and prosecuted all 7 of the surviving plaintiffs falsely and prosecuted them wrongfully and maliciously. Plaintiffs invoked this court's jurisdiction under the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States;

42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986 and 1988; 28 U.S.C. §§ 1331 and 1343; and under Ill. Rev. Stat. Ch. 70, § 70-1, 2.

Plaintiffs were Iberia Hampton, Administratix on behalf of the Estate of Fred A. Hampton, deceased; Fannie Mae Clark, Administratix of the Estate of Mark Clark, deceased; Verlina Brewer, Deborah Johnson, Ronald Satchel, Harold Bell, Blair Anderson, Brenda Harris and Louis Trueluck. Defendants upon trial of the cause were the 13 Chicago police officers detailed as State's Attorney's police who actually participated in the serving of the search warrant, namely Ray Broderick, Edward Carmody, John Ciszewski, William Corbett, James Davis, Joseph Gorman, Daniel Groth, Lynwood Harris, Robert Hughes, George Jones, Philip Joseph, William Kelly and John Marusich; 7 other Chicago police officers, connected either with the Internal Inspections Division or Crime Laboratory, namely Harry Ervanian, Charles Koludrovic, Robert Kukowinski, John Meade, John Mulchrone, David Purtell and John Sadunas; the former State's Attorney of Cook County, Edward V. Hanrahan; three former Assistant State's Attorneys, Richard S. Jalovec, James Meltreger and Sheldon Sorosky; three former or present agents of the Federal Bureau of Investigation, Marlin Johnson, Roy M. Mitchell and Robert Piper; and an FBI informant, William O'Neal.

Also named as defendants originally were the City of Chicago; County of Cook; the late Richard J. Daley, then Mayor of the City of Chicago; James B.

Conlisk, then Superintendent of Police, City of Chicago; Fred Howard, a police officer, now deceased; James Doe; John Doe; Richard Roe and Frank Zoe. (Plaintiffs later amended their complaint to include the three FBI agents and the FBI informant as parties defendant.) On February 13, 1972 in a Memorandum Opinion and Orders, this court denied the pre-trial motions to dismiss filed by the 14 police officers (including Howard, not then deceased) who actually participated in the serving of the warrant and it ordered plaintiffs to file amended complaints against the 14 officers. The court granted the motions to dismiss of the other defendants. *Hampton* v. *City of Chicago, Cook County, Illinois*, 339 F. Supp. 695 (1972). Plaintiffs appealed.

On August 24, 1973 the United States Court of Appeals for the Seventh Circuit affirmed that part of this court's orders holding the allegations were sufficient to state claims against the participating police officers and that part of its orders holding the allegations were insufficient against Daley and Conlisk. It also affirmed this court's dismissal of claims against the City and County except that it held the District Court had jurisdiction over plaintiff Brewer's state law claims against the County "and presumably against the City as well, on the basis of diversity of citizenship". The Court of Appeals reversed as to the dismissal before trial of charges against the State's Attorney, three Assistant State's Attorneys, and the 7 individual connected with the police department's Internal Inspections Division and Crime Laboratory.

It remanded the case for further proceedings. *Hampton* v. *City of Chicago, Cook County, Illinois*, 484 F.2d 602 (7th Cir. 1973).

This court's order dismissing Mayor Daley and Superintendent Conlisk therefore became final as a result of the affirmance as did its order regarding the City and County except for the Brewer claims against the City and County. The court thereafter granted the motion of defendants to sever Brewer's claims in counts 15, 16 and 17 of the Amended and Consolidated Complaint and trial of the issues therein were postponed until after the trial of plaintiff Brewer and all of the other plaintiffs against the 28 individual defendants. (On December 4, 1974 in its Amended and Consolidated Complaint, plaintiffs named as additional parties defendant the four Federal defendants.)

The State defendants had also moved the court to strike Counts 15, 16 and 17 against the City, County and State defendants on the grounds that federal jurisdiction predicated upon diversity of citizenship did not actually exist since, as defendants alleged, Brewer had not evidenced an intent to abandon Illinois as her state of domicile and to assume a new domicile at the time of her filing of her complaint and, further, that the consolidation of the cases, by agreement, destroyed the necessary complete diversity of plaintiffs and defendants. The court took this alternative motion under advisement. (This alternative motion was ruled upon at the conclusion of the trial, as later herein set forth.)

It also appeared to the court that named defendants James Doe, John Doe, Richard Roe and Frank Zoe had never been served and were, in fact, fictitious names. The court therefore ordered those names stricken wherever they appeared in the Amended and Consolidated Complaint. At the beginning of the trial, Chris H. Howard, Administrator of the Estate of defendant Fred Howard, a deceased Chicago policeman, moved to dismiss the suit against Howard and his estate on the grounds that the death of Howard had been suggested in the record more than a year before the trial; that leave had been given to make the estate a party defendant and to have service of process upon the administrator but that such had not been done. Upon hearing the plaintiffs conceded the motion and the complaint was dismissed against Howard and the administrator of his estate.

Thus 28 individuals remained as defendants at the time of trial.

On the opening day of the trial, plaintiffs' counsel announced that plaintiffs asserted and would prove one overall conspiracy among the defendants. Counsel described the conspiracy as a part of a nationwide Counter Intelligence Program, conceived and implemented by the late J. Edgar Hoover, former Director of the Federal Bureau of Investigation, and various officials in Washington "to cripple the Black Panther Party, prevent the rise of a black Messiah such as Mr. Hampton, to neutralize and disrupt the Black Panthers, especially here in the city [Chicago]". Counsel alleged that the Federal defendants in this

case were working pursuant to those directives in Chicago and conspired with the State defendants to violate the constitutional and statutory rights of plaintiffs herein.

More specifically, plaintiffs alleged in their Amended Complaint that certain Federal and certain State defendants met together, planned the "raid," agreed and conspired together to enter the apartment illegally and to use excessive and deadly force upon the occupants and thereafter to suppress the true nature of the actions of defendants. Further plaintiffs alleged that prior to the occurrence the Federal defendants obtained information regarding weapons in the apartment and communicated it, together with a diagram of the apartment showing where certain plaintiffs stayed in the apartment, and in other ways conspired with the State defendants to conduct the "raid" on the apartment.

Discovery

Numerous written interrogatories were served and the depositions of at least 59 individuals were taken by the parties in connection with this case. In addition during the pre-trial discovery period, plaintiffs asked for the production of thousands of pages of files and records of the Federal Bureau of Investigation ("FBI") and thousands of pages of files and records of the Chicago Police Department ("CPD").

Pursuant to such requests of plaintiffs, the court entered numerous orders for the production of FBI files and records and these were produced under pro-

tective orders providing, among other things, for the expunging of the names of confidential informants from the FBI documents before copies were furnished to plaintiffs. The court examined these documents *in camera*. It compared the original FBI documents with the expurgated copies (copies with deletions) produced for plaintiffs in order to ascertain the expurgations were properly made in accordance with the court's orders. The court estimates that in excess of 100 out-of-court hours and time on weekends were spent by it in making such comparisons on the FBI documents alone. Pursuant to plaintiffs' request, they received, for example, over 50,000 pages of documents from FBI files. The FBI produced evidence during the trial that it expended man hours costing in excess of $30,000 to produce the records for plaintiffs and, further, that it had not been reimbursed for any part of this expense.

Also pursuant to the request of plaintiffs, the court ordered counsel for the State defendants to produce thousands of pages of documents from CPD files after the deletion of informant's identities and information which might lead to their identities. Counsel for the State defendants spent hours and weeks complying with plaintiffs' requests and the court's orders. The court made an *in camera* review of these documents including approximately 15,000 documents alone from the CPD's intelligence division. It appears that not a single page of these were put into evidence by plaintiffs. Also produced for plaintiffs were records of the CPD's Internal Inspections Division concerning com-

plaints made against the police officer defendants. The only CPD documents put into evidence by plaintiffs were a few reports.

Also available to the parties during the trial were the records of innumerable proceedings held prior to this trial. Immediately after the occurrence, it became highly controversial. The occurrence generated a great deal of public interest. It appears both the plaintiffs and defendants gave their versions of the occurrence to the news media and feelings and opinions about the occurrence were polarized. The Chicago Police Department's Internal Inspections Division conducted an inquiry into the conduct of the 14 participating police officers. Recommendations were made to the Superintendent of Police not to discipline them. A "blue ribbon" coroner's jury was convened and twelve days later returned a verdict of justifiable homicide based on the evidence before it. On January 30, 1970 the Cook County Grand Jury indicted the surviving plaintiffs for attempted murder and other felonies. Investigations of the occurrence were made by a County Grand Jury, a Federal Grand Jury and a Special County Grand Jury. The Federal Grand Jury was impaneled in late December, 1969, and this court takes judicial notice of the fact that the cooperation of the surviving plaintiffs was denied to the Federal Grand Jury *Report of the January 1970 Grand Jury*, United States District Court, Northern District of Illinois, Eastern Division, dated May 15, 1970, Corrected Edition to correct certain printing errors, dated June 1, 1970. The Federal Grand Jury

returned no indictments but made a report which was beyond its lawful authority. Prior to making that final report, the attorneys for the Justice Department urged State's Attorney Hanrahan to dismiss the indictments against the surviving plaintiffs. The Grand Jury adjourned to await his action. After he acted the Grand jury was reconvened and the unusual report was made by it. It is apparent from all the circumstances, the State's Attorney was coerced into dismissing said indictments.

It also appears from the evidence available that the surviving plaintiffs did not appear to testify before any of the official investigative bodies until some of them appeared before the Special County Grand Jury convened in June 1970. The evidence at this trial shows that the morning after the occurrence the Panthers began gathering their own evidence from the apartment. It also appears the Party sponsored "The People's Inquest" at a local church at which unofficial investigation several of the survivors testified after refusing to testify before official bodies.

In June 1970 the Special Grand Jury was convened to investigate matters relating to the occurrence. A Special State's Attorney was named to direct the investigation. On August 24 indictments of certain law enforcement officials and 8 of the 14 participating police officers were announced. Charged with conspiring to obstruct justice were Hanrahan, Jalovec, Mulchrone, Meade, Sadunas, Koludrovic, Sgt. Groth and Officers Broderick, Carmody, Ciszewski, Corbett, Davis, Gorman and Jones. Named as unindicted co-

conspirators were Superintendent Conlisk, Evranian, Meltreger, Sorosky and Earl A. Holt (a Police Crime Laboratory Firearms Expert). That trial began in the Criminal Court of Cook County in July 1972 and related to post-occurrence events. At the close of the prosecutions's case, the defendants there moved for acquittal and on October 25, 1972, Judge Philip Romiti granted the motions of acquittal and in his ruling concluded the evidence was "simply not sufficient to establish any conspiracy against any defendant".

In this civil trial for damages, recently concluded, reference was repeatedly made to testimony given before certain of these official investigative bodies in the days and months immediately following the December 4, 1969 occurrence, especially in connection with the conspiracy allegations made by plaintiffs in their Amended Complaint herein.

The Evidence And The Directed Verdicts As To 21 Defendants At End of Plaintiffs' Case In Chief

By the middle of the 16th month of this trial, plaintiffs had 33 witnesses in their case in chief on the issues of conspiracy and liability. (Originally the plaintiffs had listed over 400 witnesses they expected to call. During the entire trial, plaintiffs called a total of 46 witnesses and defendants called 10 witnesses.) At the close of plaintiffs' case in chief, each of the 28 defendants moved for a directed verdict as to him.

The court considered the motions, plaintiffs' opposition thereto, the memoranda of counsel for the parties and the applicable law. It heard extensive argument. The court reviewed all of the evidence presented up to that time and it reviewed the evidence of plaintiffs, with all reasonable inferences that could be drawn therefrom, in the light most favorable to the plaintiffs. The court concluded, as a matter of law, that no *prima facie* case of a conspiracy or joint venture had been established as alleged in the Amended Complaint, as to certain defendants herein. The court, therefore, on April 15, 1977 granted motions for directed verdicts as to 21 of the 28 defendants respecting all counts in which they were charged. Police Officers Groth, Davis, Gorman, Jones, Carmody, Ciszewski and Broderick were in the apartment at the time of the occurrence and fired weapons during the occurrence. The motions of these seven defendants for directed verdicts were granted as to all counts except as to Counts 1, 2 and 14 of the Amended Complaint. Judgments were entered in accordance with the court's order. Plaintiffs were then directed to begin their proof of damages before the jury, with the defense of the remaining 7 defendants to said counts and plaintiffs' rebuttal evidence to follow.

The court was not bound to hear oral argument on the motions for directed verdicts but did; nor is it required to make findings of fact in connection with its decision. However, at the time of entry of its order, the court purposely refrained from elaborating upon its statements made therein, as aforesaid, that

as a matter of law no *prima facie* case of conspiracy and no *prima facie* case of liability had been established as to certain defendants. There had been throughout this trial extensive coverage by the news media and the court deemed it prudent to refrain from elaborating on its simple statements in the event (despite its precautions) the court's view, as a matter of law, as to the evidence against the 21 defendants might reach members of the jury and in some way affect their verdicts as to the seven remaining defendants.

After further trial of the 7 remaining defendants, the jury began its deliberations but reported it was deadlocked, as more fully detailed hereinafter. The court is now free to more specifically state that there was not sufficient evidence adduced of the alleged conspiratorial nexus between the Federal and State defendants, or a conspiracy by and between the State defendants, or by and between the Federal defendants. By April 15, 1977, plaintiffs' evidence was not sufficient as a matter of law on both the issues of conspiracy and liability to justify the submission to the jury of the plaintiffs' case against 21 of the defendants. The court had no alternative but to then grant the motions of the 21 for directed verdicts and to grant the motions of all of the defendants to dismiss the charges of conspiracy against them. The evidence before the court made a *prima facie* case of the use of excessive force by only 7 defendants. The court denied their motions as to three counts and directed them to proceed with their defense. The

evidence adduced on plaintiffs' case in chief showed the search of the apartment was not planned by the FBI defendants and that the search was not made at the request of the FBI, as alleged by plaintiffs. It did show the search of the apartment was made pursuant to a validly issued search warrant. The request for the warrant was founded upon information supplied by informant O'Neal and upon information supplied to Officer Groth by an informant whom he considered reliable. Sergeant Groth sought legal advice before obtaining the warrant. A judge of the State court found the reasons sufficient for its issuance and it was issued. Thereafter the 14 participating police officers went to the apartment and acted pursuant to the warrant's command.

The court takes judicial notice from the evidence available of the climate in which the occurrence took place. It is clear that preceding the occurrence on December 4, 1969 at the apartment on West Monroe Street there had been numerous incidents in Chicago of armed violence involving members of the Black Panther Party and law enforcement agencies and that law enforcement agencies had been keeping the Panthers under surveillance. For example, in the summer before the occurrence five police officers and three Black Panther Party members had been wounded in a gun battle at the Party's headquarters on Chicago's west side not far from where the occurrence at the apartment was subsequently to take place. Guns were seized at the headquarters. Less than a month before the occurrence two Chicago policemen,

Officers Gilhooly and Rappaport, and a Black Panther Party member, Jake Spurgeon Winters, were killed in a gun battle. These incidents and others involving the Panthers and the police had been given prominent press coverage. It was a time of tension and stress.

The evidence revealed that both the FBI and local law enforcement agencies had the Black Panther Party in Chicago under surveillance as they had a right and lawful duty so to do. However, the plaintiffs did not prove their allegations of conspiracy between the Federal and State defendants to violate the civil rights of any of the surviving plaintiffs or the decedents whom they represent. Plaintiffs throughout the trial placed great emphasis on the FBI's so-called Contelpro [sic], but various of the State and Federal defendants testified that they were unaware of such a program and their testimony was not contradicted by any evidence whatsoever. One of the principal defendants, Edward V. Hanrahan, testified that he was not aware of such a program until some years after the occurrence at the apartment when he read about it in a newspaper. Jeffrey Haas, one of the attorneys for plaintiffs, then in open court stated on the record that the plaintiffs agreed such facts had been kept from Hanrahan and that the FBI had used him as a dupe. The existence of such a program was kept within the FBI and not disseminated outside the FBI, according to the evidence presented in the case.

Each of the Federal defendants was called by plaintiffs as adverse witnesses. Each testified extensively

and denied knowledge or, [sic] or participation in, a plan, or an agreement, or a conspiracy between themselves, or between them or any of them, and any and all of the State defendants to violate plaintiffs' constitutional and statutory rights through conduct of the search of the apartment, or prior thereto, or after the occurrence, or otherwise. Their denials were uncontradicted and unimpeached by any testimony whatsoever.

The evidence adduced showed the FBI did have a counterintelligence program called "Contelpro" [sic] but only the FBI participated in it. In late 1968 the Chicago office of the FBI commenced an investigation of the Black Panther Party in Chicago. The FBI had a duty to investigate criminal activities and had a right to conduct surveillance of persons suspected of being engaged in criminal activity and to conduct a counterintelligence program against such persons. The FBI did so. Agents of the FBI, such as the defendants herein, had a right and a responsibility to disseminate information, including that regarding weaponry, to other law enforcement agencies. Agent Mitchell so did. There was not a scintilla of evidence concerning agents stealing evidence from plaintiffs or of them committing acts of burglary or other unlawful acts against any of them or against any other persons. The FBI had authority to tap telephone conversations which it did. The evidence revealed the FBI agents were conducting investigations that were their legal obligation to conduct and no other. The purpose of the counterintelligence program, as it was

implemented in Chicago as to the Panthers was to prevent violence; and it was in every way warranted as a matter of fact and law.

The evidence adduced did show FBI Agent Mitchell obtained information regarding weapons in the apartment and prepared a diagram of the apartment as part of the FBI's investigation of the Black Panther Party. In line with standard FBI procedures, Mitchell disseminated this information to other law enforcement agencies, including the office of the State's Attorney, and more specifically to Assistant State's Attorney Jalovec. This was in line with the usual practice of law enforcement agencies to exchange information and was a lawful exercise of their duties. Jalovec testified that he never discussed this information with Federal defendants Johnson, Piper and O'Neal. There was no evidence to the contrary. Mitchell and Jalovec both testified that they never met together to plan a "raid" upon the apartment and there was no evidence to the contrary. Jalovec further testified that Mitchell never urged or requested that the State's Attorney's office conduct a "raid". Mitchell testified that he never learned the State's Attorney's office was planning a raid and that he learned about it the morning after the occurrence on his way to work. There was no evidence to the contrary. Plaintiffs' evidence did not in any way contradict Jalovec and Mitchell's testimony. It was information from the FBI about the incorrect identification of two shells fired at the scene which in part was eventually to lead to the dismissal of indict-

ments in the State court against the surviving plaintiffs on or about May 8, 1970. Defendant Sadunas made an error in his firearms report which he corrected when supplied with additional information by the FBI. There was no other error in his report.

In at least 11 counts of the Amended Complaint, plaintiffs alleged the defendants conspired or were engaged in a conspiracy or in some way acted jointly to deprive plaintiffs of their constitutionally protected civil rights.

A conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful manner. A civil conspiracy is defined in Prosser, *Law of Torts*, 260 (196—) as a combination between two or more persons to commit a wrongful act and the commission of an act by one of the parties pursuant to the agreement which is itself a tort. *In Rotermund* v. *United States Steel Corporation*, 474 F.2d 1139, 1145 (8th Cir. 1973), the court described a civil conspiracy as "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another', and 'an overt act that results in damage.' Neff v. World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965)." In the United States Court of Appeals for the Seventh Circuit, it has been held that to prove a conspiracy the law required ". . . that there be a single plan, the essential nature and general scope of which is known to each person

who is to be held responsible for its consequence." *Hoffman-La Roche, Inc.* v. *Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). In an action under 42 U.S.C. 1985(3), the United States Supreme Court has said that plaintiffs must establish that ". . . there is some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' actions." *Griffin* v. *Breckenridge*, 402 U.S. 88, 102 (1971).

Evidence of a conspiracy must be clear and convincing and the burden of proof was upon the plaintiffs to prove the existence of the alleged conspiracy by a preponderance of the evidence.

The evidence presented in this case, viewed in a light most favorable to the plaintiffs, did not establish, as a matter of law, an unlawful conspiracy.

On the contrary, the evidence showed each and every defendant acted pursuant to law on all occasions, prior to, at the time of the service of the search warrant on the premises at 2337 West Monroe Street, Chicago, and at all time subsequent thereto; at no time did any of them use more force than necessary to serve said search warrant. The evidence showed that each of them acted in good faith at all times before, during and subsequent to the service of said search warrant and there was probable cause for the acts of each and every defendant named herein to act as he did.

The record at the time of the motion of the four Federal defendants for directed verdicts was devoid of proof of their participation in a conspiratorial

plan among themselves or with the State defendants. Thus no liability on their part existed and their motions for directed verdicts were granted.

The court also directed verdicts as to the State's Attorney and three Assistant State's Attorneys.

It was the duty of Assistant State's Attorney Jalovec to receive information about law violations, to investigate allegations thereof, and to assist police officers in the preparation of search warrants, such as the one prepared in connection with the search of the apartment at 23337 West Monroe Street. Jalovec had already received information about the suspected existence of an arms cache from the FBI. Officer Groth had information from one he considered a previously reliable informant about illegal weapons and ammunition at the apartment. It was to Jalovec that Groth came with his information. Groth and a group of officers from the Chicago Police Department were "detailed" to a special unit under Jalovec. Jalovec and Groth discussed their information and decided they had probable cause for the search warrant. Jalovec proceeded to prepare the warrant and Groth went ahead with plans for the service of the warrant which was signed by Judge Robert Collins late on the afternoon of December 3, 1969. It was Jalovec's duty to assist Groth. In performing this duty and other complained of by plaintiffs, Jalovec was acting within the scope of his prosecutorial duties. Plaintiffs evidence did not prove he was acting otherwise. After the occurrence at the apartment the CPD's Internal Inspections Division conducted

an investigation of the conduct of the 14 participating police officers. Jalovec was ordered to observe these proceedings. Jalovec testified that plaintiffs' attorneys were asked to bring plaintiffs before the IID to make complaints but that they did not come. The evidence adduced did show Jalovec was an observer of the IID proceedings, which proceedings are hereinafter more fully described. The evidence did not prove that Jalovec was an advisor or planner of these proceedings. Even if the defendants had been guilty of obstructing justice their acts could in no way be relevant to the case at bar. This all occurred after the time plaintiffs were injured or damaged.

The plaintiffs laid great stress upon their charge that the search warrant was invalid. They sought to ask Sgt. Groth to reveal the name of his informant both before the trial and during the trial. Sgt. Groth refused to reveal the name of his informant and gave as his reason that to do so would endanger the lives of others. The court sustained his plea that he had received said information in confidence as a police officer and could not be compelled to reveal the name of the informant. The court relied on the case of *In Re: The Matter of Ex Parte David R. McClelland*, No. 36671. In the Missouri Court of Appeals, St. Louis District, Division Two, January Session, 1975, which the court considers a case directly in point. No contrary authority was cited. Counsel for plaintiffs argued that the informant had to be a member of the Black Panther Party and that it might even be one of the plaintiffs. Under the evidence and circum-

stances of this case, the court was and is of the opinion that Sgt. Daniel Groth's plea of confidentiality must be respected. Counsel for plaintiffs argued that Sgt. Groth in fact had no confidential informant and that his affidavit supporting the complaint for search warrant was issued by Judge Robert Collins upon a false affidavit. Even if Sgt. Groth's affidavit had been false to the extent of his having no informant the remaining part of the affidavit and complaint was established to be true by testimony elicited by plaintiffs and relied upon by them in their charge of conspiracy. Plaintiffs elicited evidence that Special FBI Agent Roy Martin Mitchell had furnished to Jalovec the same information concerning the existence of illegal weapons and ammunition at 2337 West Monroe Street. Then when the search warrant was served that same information was verified by the seizure of 19 illegal weapons and nearly 2000 rounds of ammunition. Plaintiffs failed to make any showing whatsoever to support their charge that the search warrant was invalid.

Defendant Edward V. Hanrahan was the State's Attorney at the time of the occurrence. He testified, as aforesaid, that he had no knowledge of the FBI's counterintelligence program until some years after the occurrence when he read about it in a newspaper and after his term of office as State's Attorney had ended. Plaintiffs' evidence did not prove Hanrahan knew about the program and conspired to advance it. It did not show he participated in the planning prior to the service of the search warrant. As to Hanrahan's activities following the occurrence, plaintiffs did not prove Hanrahan acted beyond the scope of his duties and his discretion as a prosecutor in initiating and pursuing criminal prosecutions. After the weapons were seized and the surviving plaintiffs arrested, Hanrahan had a duty to prosecute those who possessed illegal and unregistered weapons. The evidence did not show he acted in the role of a policeman. Nor did plaintiffs prove Hanrahan liable under the theory of *respondeat superior* or of negligence. The evidence showed he acted in good faith and with probable cause. Further, from the evidence the court concluded Hanrahan's activities were within the parameters of immunity established in *Imbler* v. *Patchtman*, 424 U.S. 409 (1976) and that he is immune from suit under Title 42 U.S.C. §§ 1981 et seq. for all of his acts that the evidence in this case shows he performed or supervised. Nor was he guilty of slander or libel for any of his statements made in public or conveyed to the public by the news media. His statements are protected under the First Amendment and the rulings of the Supreme Court as fair comment. In most instances his statements were shown to be factually true.

Assistant State's Attorneys Meltreger and Sorosky were not called as witnesses by plaintiffs. They were among those "some or all" of the defendants named in certain counts of the Amended Complaint and charged with, among other things, giving false testimony and false information before investigative bodies, intentional deprivation of civil rights of plain-

tiffs by arrest and wrongful and malicious prosecution and with neglect to prevent harm from conspiracy by wrongful prosecution. It appears from the evidence available Meltreger and Sorosky were at police headquarters at 11th and State in Chicago to observe the taking of the statements of the 14 participating police officers before the Internal Inspections Division. This was about two weeks after the occurrence. The evidence did not show them to be advisors or planners of this inquiry. By that time the criminal prosecutions had already commenced and it was within the scope of their duties to attend such proceedings as observers.

The allegations in the Amended and Consolidated Complaint that Hanrahan, Jalovec, the 14 participating police officers and 7 other police officers connected with the IID and Crime Laboratory conspired to cause the false arrest and imprisonment of the surviving plaintiffs, the unfounded prosecution of them and the concealment of the truth about the occurrence was not proved by plaintiffs.

Hanrahan, Jalovec, Meltreger and Sorosky were engaged in their prosecutorial duties. In addition to the foregoing reasons, the court concluded they were immunized by the *Imbler* doctrine and verdicts were directed as to them.

Thirteen of the defendant police officers were "detailed" to or on detached service with the Office of the State's Attorney. The court directed verdicts in favor of six of them, namely Officers Corbett, Harris, Hughes, Joseph, Kelly and Marusich. They were not

called to testify. However from their testimony on depositions, before the Cook County Grand Jury, the Federal Grand Jury, the Special Cook County Grand Jury and Coroner's Inquest, from answers to requests for admissions which were admitted into evidence, and other evidence, it was undisputed that Harris, Hughes and Marusich were assigned to guard the area outside of and in front of the Monroe Street apartment and that Corbett, Joseph and Kelly were assigned to cover an area outside of and in the rear of the apartment, and that, further, none of these six officers fired their guns in connection with the occurrence, as did the seven other police officers who went inside the apartment at 2337 West Monroe Street in serving the search warrant.

Nor was there evidence adduced as to the use of excessive force against plaintiffs by these six. Plaintiffs did not prove these six had anything to do with obtaining the search warrant. They were not shown to have even known about, much less to have been a party to, a conspiracy involving the federal defendants. They did not place any of the plaintiffs under arrest. The evidence does not show that they signed any complaints against plaintiffs or that they had anything to do with a decision to prosecute the surviving plaintiffs. The available evidence shows these six participated in the occurrence in question in compliance with the order of the State court to search the premises for illegal weapons, a warrant based on probable cause. From the available evidence it appears these officers followed the command of that

warrant and acted in good faith. Plaintiffs did not prove otherwise.

In their Amended Complaint, plaintiffs alleged that the seven police officers connected with the Police Department's IID and Crime Laboratory joined in an extensive conspiracy with Hanrahan, the Assistant State's Attorneys and the 14 participating police officers to cause the false arrest and imprisonment of the surviving plaintiffs, to institute an unfounded prosecution and to control the truth about the occurrence, as aforesaid. At the time of the occurrence four of the seven police officers were connected in one way or another with the Chicago Police Department's Internal Inspections Division. Mulchrone was a supervisor of the IID; Ervanian was director of the IID; Meade was a legal aid to Mulchrone and assigned to the investigation of the occurrence; Kukowinski headed the excessive force unit of the IID. The depositions of two of these defendants, Ervanian and Mulchrone, were taken prior to trial. Plaintiffs did not call any one of these four as witnesses during the trial. In fact, the evidence concerning them came from the testimony of Assistant State's Attorney Jalovec. Their connection with the occurrence came from their participation in the investigation made by the IID after the occurrence. Jalovec's testimony showed this was their only connection. At the time the Chicago Police Department had an internal disciplinary process and under it the 14 police officer participating in the occurrence were called before the IID.

Plaintiffs did not initiate this process. In fact Jalovec testified that plaintiffs' attorneys were asked to bring plaintiffs before the IID to make complaints but they did not come. In their Amended Complaint plaintiffs' charged Mulchrone and Ervanian intentionally limited the scope of their examination so as to prevent any information emerging contradictory to that given by the State's Attorney's police after the occurrence; charged Meade prepared a set of questions that would not test the veracity of these policemen, and charged Kukowinski with limiting the interrogations to those prepared by Meade. Under the disciplinary mechanism, it appears from the available evidence that Mulchrone, Ervanian, Meade and Kukowinski were acting in a quasi-judicial capacity. As such they had an obligation to observe due process as to the police officers before them. The fourteen police officers had a right to be informed of any improper or illegal act each was alleged to have committed. Plaintiffs did not come forward to make such complaints to the IID. Statements were taken from the police officers about the occurrence. Recommendations were made to the Superintendent of Police not to discipline them. Upon this trial plaintiffs did not adduce evidence of a lack of good faith of Mulchrone, Ervanian, Meade or Kukowinski or of a malicious intention on their part to deprive plaintiffs of their constitutional rights. They did not show these four defendants knew about the FBI's counterintelligence program. There was no evidence that they participated in the prosecution of plaintiffs. Upon this

trial there simply was not sufficient evidence adduced to support the allegations made against these four defendants and their motions for directed verdicts in their favor were granted.

Defendant Charles Koludrovic was on plaintiffs' original list of witnesses but he was never called to testify. He did testify before the Coroner's Inquest and the Federal Grand Jury. The only evidence available concerning him was from this prior testimony, a stipulation of the State defendants and in the testimony of Groth at this trial. In their allegations plaintiffs charged defendant Koludrovic, as supervisor of the Mobile Crime Laboratory, and other members of the Mobile Crime Laboratory (not named) intentionally limited their investigation of the evidence at the apartment to a search for evidence that would show shots had been fired by plaintiffs inside the apartment and, further, that it was the intent of Koludrovic and others to cover up what transpired by not determining the nature and extent of the shots fired by the police officers. In another allegation, plaintiffs charged Koludrovic gave false testimony before the Special Coroner's Inquest about the physical evidence taken from the apartment after the occurrence and the analysis of that evidence with the intention of justifying the conduct of the prosecution of plaintiffs. The evidence showed Koludrovic did go to the apartment in response to a police radio call; that he did recover evidence items there and that these items were thereafter turned over to the FBI's laboratory in Washington for examination. (The FBI

later recovered many evidence items from the apartment.) The evidence also shows Koludrovic and others also made photographs of rooms and walls and doors in the apartment. Although plaintiffs charged Koludrovic testified falsely before the Special Cook County Coroner's Inquest, there was no evidence presented on this. Nor was their evidence adduced that he was a participant in a conspiracy. Therefore his motion for a directed verdict in his favor was granted.

John Sadunas was a firearms examiner in the CPD's Crime Laboratory. It was his duty to run firearms identification tests. Plaintiffs alleged in their Amended Complaint that Sadunas testified falsely at the Special Coroner's inquest about the physical evidence removed from the apartment and, further, that Sadunas did this to create an erroneous impression of plaintiffs' conduct at the time of the occurrence and to support the conduct of the police and the official version of the occurrence. His deposition was taken. He was not called by plaintiffs as a witness. The available evidence showed that he examined ballistic material recovered from the apartment. He at first identified two shotgun shells as being fired by Brenda Harris' shotgun after making test firings. Later, after items were turned over to the FBI's crime laboratory, Robert Zimmers, a firearms examiner, concluded the shells were from the shotgun of Police Officer Ciszewski. Zimmers, who testified at this trial, so informed Sadunas. After Zimmers so informed Sadunas, Sadunas made further test firings

and reached the same conclusion as Zimmers. Following this, on motion of the State's Attorney, the indictments against the occupants of the apartment were dismissed. The testimony regarding the test firings, identification, etc., were involved and reflected in the record. Zimmers testimony was to the effect that in his opinion Sadunas in his examination did not deliberately misidentify the shells. Plaintiffs in their evidence did not show Sadunas was ever asked to make a misidentification of any item he examined; nor did they show he discussed the identification with anyone other than Zimmers until after the indictments were dismissed. Sadunas initial report was read to the County Grand Jury which indicted the surviving plaintiffs by an Assistant State's Attorney. Sadunas report was made weeks after the plaintiffs had been arrested. There was no evidence adduced that he instigated the prosecution of them. Although he initially misidentified the shells, it appears from the evidence available that he acted in good faith. His motion for a directed verdict in his favor was also granted by the court.

David Purtell was among those "some or all" of the defendants charged in Counts 8, 9 and 10 of the Amended Complaint with, *inter alia*, a conspiracy, malicious prosecution and neglect to prevent harm. Purtell was not called as a witness by plaintiffs. Nor was his name mentioned [d]uring the trial except by Witness Zimmers who said David Purtell was director of the Chicago Crime Laboratory at the time the FBI began its investigation of evidence items. As

such Purtell was the supervisor of Koludrovic and Sadunas. Plaintiffs did not adduce evidence to show he participated in or supervised the alleged activities of Koludrovic and Sadunas and he could not be held liable under the doctrine of *respondeat superior*. There was no evidence adduced that he was a part of a conspiracy to violate plaintiffs' civil rights or that he caused any one of them any injury. Accordingly, his motion for a directed verdict was granted.

At the close of plaintiffs' case in chief the court also granted the motions of the seven participating police officers for directed verdicts as to counts alleging conspiracy and certain other counts. It at that time denied their motions as to Count one, alleging defendants intentionally, and Count two, alleging that defendants negligently, deprived plaintiffs of their civil rights by illegal entry, assault, battery and other illegal acts and it also denied their motions as to Count 14, an action for the wrongful deaths of Hampton and Clark. Plaintiffs had not shown, as they had not with the other State defendants, that these men knew about Contelpro [sic]. Plaintiffs had not proved that these seven conspired with the Federal defendants or the other State defendants to falsely imprison or to maliciously prosecute plaintiffs.

Plaintiffs in their complaint had alleged that they were deprived of their right to equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because certain defendants, including these seven policemen, "did shoot, wound, and brutalize the

plaintiffs and plaintiffs' decedents [and did plan to do so] because of their race and political beliefs." Plaintiffs did not prove these seven, or any other of the defendants, had invidiously discriminatory animus towards any of the plaintiffs. There was no evidence adduced to show that plaintiffs, individually or as members of the Black Panther Party, were discriminated against or treated by the seven policemen or any of the other defendants in any way differently from anyone else who illegally possessed weapons. Of the fourteen participating police officers, nine were white and five were black. There was no evidence adduced that that [sic] the seven stationed outside the apartment, or the seven who entered the apartment knew who, in fact, was in or at the apartment besides the police.

Evidence was adduced of newspaper accounts, news interviews and television enactments of the occurrence. Plaintiffs tied those in which defendants participated into their allegations of conspiracy. The evidence showed that the representations and statements made by each and every defendant were fair comment and were supported by the facts brought out on the trial and that they were made in response to false and malicious representations and charges of murder made by members of the Black Panther Party and sympathizers who were not present and knew nothing whatsoever of the facts.

Near the end of the trial the court granted the motion of Deborah Johnson to amend the Amended and Consolidated Complaint to show she was bringing

her actions not only individually but also on behalf of Fred Johnson, a minor, as his mother and next friend. At the time Deborah Johnson filed as plaintiff in one of the suits herein consolidated, she did not sue on behalf of Fred Johnson, as Illinois law precluded his inheriting from Fred A. Hampton, his putative father. The United States Supreme Court recently declared that provision of the Illinois law unconstitutional in *Trimble, et al.* v. *Gordon, et al.*, 75-5952, U.S. L.W. 4395.

The Remaining Counts Against The Seven Remaining Defendants and The Evidence

After entry of judgment on the aforesaid 21 directed verdicts, trial proceeded before the jury on the remaining counts against the 7 police officers who fired their weapons at the time of the occurrence.

The remaining counts were 1 and 2 of the Amended and Consolidated Complaint, alleging defendants intentionally and negligently deprived plaintiffs of their civil rights by illegal entry, assault, battery and other illegal acts, and count 14, alleging the wrongful deaths of Hampton and Clark. Plaintiffs called the surviving plaintiffs and others as witnesses in their case in chief in support of the allegations of their complaint. Plaintiffs called Groth and Carmody as adverse witnesses during their case in chief. Defendants called Gorman, Ciszewski, Davis, Broderick and Jones, and relied on the earlier testimony of Groth and Carmody in their defense of the remaining counts.

The most controversial issue in this trial was the question of what actually transpired inside the apartment at 2337 West Monroe Street on the morning of December 4, 1969. Plaintiffs devoted considerable of its evidence on its case in chief to support of its conspiracy allegations. But plaintiffs' principal evidence was aimed at proving their allegations that the police officers' actions were premeditated and illegal and that the officers used excessive force.

The 7 remaining defendants were part of a party of 14 police officers detailed as State's Attorney's police, implementing the search warrant to seize illegal weapons. The evidence revealed that Sgt. Groth received information as to weapons in the apartment at 2337 West Monroe Street from an informant he considered reliable. He was not required by this court to answer questions regarding the identity of his informant upon deposition or upon trial. He discussed this information with Assistant State's Attorney Jalovec, who also had information, as aforesaid, and they decided they had probable cause for a search warrant. The warrant issued by the State court commanded Groth to search the premises. Plaintiffs did not show the entry of the apartment was illegal or that these 7 participating officers acted in bad faith. It was the obligation of the police officers to serve the warrant and plaintiffs did not prove they acted outside their authority in serving it. Assistant State's Attorney Jalovec testified that the officers could have been subject to disciplinary proceedings had they failed to serve the warrant. They went to the apartment to search for illegal weapons and they found them—one illegal sawed-off shotgun and one stolen police weapon and 17 other weapons, none of which had been registered to any of the plaintiffs. In their defense the police officers testified they were fired on from within the apartment as they attempted to serve the warrant. They returned the fire. Under the law, force is permissible to accomplish a search under command of a search warrant.

The apartment occupied by the surviving plaintiffs and Hampton and Clark was a first floor apartment on the South side of Monroe Street. A "mock-up" and/or model of the apartment was in evidence in this trial and was used extensively by counsel for the parties as the evidence unfolded. The door from a front porch of the building opened into an entrance foyer and a door from the foyer into an entrance hall to the first floor apartment. The apartment consisted of a living room behind which, to the East, was a North bedroom and behind it a south bedroom. A bathroom and dining room were to the West of the bedrooms and a kitchen was in the rear of the apartment.

It appears from the evidence that before the shooting began Mark Clark, Louis Trueluck, Harold Bell and Brenda Harris were in the living room of the apartment; Ronald Satchel, Blair Anderson and Verline Brewer were in the front bedroom, and Fred Hampton and Deborah Johnson were in the back (south) bedroom.

Sgt. Groth and 13 other police officers left the State's Attorney's office about 4:30 A.M. on the morning of December 4th in three unmarked squad cars and a panel truck. Upon arrival seven of the police officers were stationed outside the apartment. Groth climbed the front stairs to the first floor accompanied by Officers Jones, Gorman and Davis. Broderick, Carmody and Ciszewski went to the area of the rear door. Groth, Jones, Gorman and Davis went through the unlocked door into the entrance foyer of the building. Groth testified that he knocked with his hand on a closed door to the entrance hall to the apartment and receiving no response he pounded on the door with his revolver. After a few seconds, according to Groth, a voice asked "Who's there?" and he responded "Police Officers" and announced that he had a warrant to search the premises. Groth testified that he again waited several seconds and then pounded loudly on the door with his hand again. He said the response in a male voice was "Just a minute". He again waited and then told Officer Davis to go ahead in. Davis kicked open the door to the hall, went into it in a crouch and hit the door to the living room in a continuing rush. As Davis went through the door, a shot came from within the apartment. It was a deer slug shotgun blast through the door. The evidence revealed the shot came from a gun held by Mark Clark.

As Davis went into the apartment's living room, he went out of Groth's view. Groth feared Davis had been hit. He stepped into the doorway of the living room and observed a woman (identified in the evi-

dence as Brenda Harris). He testified she was pointing a gun at him. He assumed it was she who had fired at Davis and he shouted to the others to look out that she was going to shoot again. Brenda Harris fired a shot which went past Groth's shoulder. Groth backed out of the apartment and fired some blind shots toward the girl. He shouted for Hughes, who was outside, to call for additional help. Thirty police cars responded.

Meanwhile, Trueluck, in a statement under oath in evidence, said after the police knocked on the door he went back to the south bedroom, where Hampton was, to tell Hampton, "Chairman, chairman, the pigs [police] are vamping." Harold Bell testified that he ran down the hall of the apartment and past the north (front) bedroom and shouted at Satchel, "The pigs are coming."

It appears at this point in the occurrence before any shooting began the plaintiffs knew police were at the front door.

Plaintiffs at this trial admitted Mark Clark fired a gun. The living room was dark. Davis saw Brenda Harris, who admitted she had a gun, and Davis shot her in the thigh disabling her. In a statement to her lawyer immediately after the occurrence Brenda Harris said she was trying to find the safety on her gun. Clark had just shot through the door and Davis saw him out of the corner of his eye and turned and shot Clark through the heart and killed him. Gorman came into the living room. He and some of the other officers said they heard firings and saw flashes coming

from the front bedroom. Not knowing what weapons were in the hands of individuals who might be on the other side of the living room wall, Gorman fired over Brenda Harris and into the south wall between the living room and front bedroom. In his testimony Blair Anderson admitted at the time of this shooting he was in the front bedroom looking for a gun. Some of the officers testified they saw firings from both the front and back bedrooms. After the occurrence some of the plaintiffs gave statements to their lawyers about the firing of weapons by Panthers during the occurrence. For example, Trueluck in a sworn statement, said he fired two shots as he was going down the hallway to the south bedroom. Plaintiffs resisted the introduction of such statements. It was not clear from the evidence whether some of the unidentifiable ballistic material, or some unfound and not presented here, did or did not come from plaintiffs' guns.

One of the problems faced as to evidence in this trial stemmed from the search of the scene and process of evidence by not only several branches of law enforcement agencies but by members of the Black Panther Party themselves. Immediately after the occurrence, the State's Attorney's police began a search for weapons in a crowded and confused atmosphere. A technician from the police department's task force arrived and took pictures. Then a team from the CPD's Mobile Crime Laboratory arrived to take over the investigation. It appears the police guards left the apartment about 7:30 A.M. The evidence also re-

vealed that a short time later Francis Andrew, an attorney for the Black Panther Party, came to the scene to examine it. A film maker for the Panthers came to take movies of the premises. Under Andrews' direction approximately 100 items of evidence were gathered, including pellets and empty shells. Andrews retained a physical evidence expert to examine and retrieve evidence, which included projectiles. Though Andrews was one of the attorneys of record in this case for the plaintiffs, he was not called by the plaintiffs to present the said evidence. He did not participate as counsel for plaintiffs. The evidence was not qualified. The court must and does presume that the evidence gathered by Andrews did not favor the plaintiffs. Meanwhile members of the Black Panther Party were conducting tours of the premises. The apartment was finally sealed on December 17. The FBI began its investigation of the premises about December 22nd.

During the shooting there were three cease fires according to the officers, three pauses confirmed by plaintiff Brewer. The police officers testified they paused several times to call for the occupants to surrender. The first cease fire came after Davis' two shots at Clark, his one shot wounding Harris and Groth's blind shots. Davis heard a shot from the north bedroom breaking the first cease fire. According to the police officers Gorman fired a shot through the south wall of the living room and Gorman and Davis told the occupants to come out. There was testimony to the effect that someone shouted from the rear of

the apartment "Shoot it out" and some officers heard another shot which appeared to come from the rear bedroom. Meanwhile Officer Carmody had gone up the back stairs to the apartment. After he heard a shot he kicked open the kitchen door. As he entered he saw three flashes and believed he was being fired at. He backed out the door, broke a window intending to go through it, and instead went back and lunged through the kitchen door on his stomach. He again saw flashes of fire and fired back. Ciszewski and Broderick followed Carmody into the kitchen. There was a barricade between the kitchen and dining room and Carmondy leaped over it, firing shots toward the south (back) bedroom as he ran. Up front in the living room, Gorman fired through the wall with his machine gun. A second cease fire was heard by officers. Ciszewski shone his flashlight into the back bedroom and a man (later identified as Harold Bell) came out with his hands raised. Ciszewski also saw someone lying on a bed and saw weapons in the room.

The second cease fire was broken when police officers saw flashes from the rear of the apartment. Gorman again fired into the living room wall and so did Davis. After Bell surrendered the police officers saw more flashes from the bedrooms. There followed a third cease fire and during it Trueluck and Deborah Johnson came out of the back bedoom. Carmody went into the back bedroom to remove Hampton's body. Ciszewski went into the back bedroom to remove weapons. He called out he was shot and a third cease

fire was broken. Additional firings followed. Gorman, believing the occupants of the front bedroom would not come out voluntarily, went into the front bedroom. He said a figure with a gun fired at him and that another figure was moving between the beds (Brewer). Gorman saw a third person on the floor. Later this person was identified as Satchel and he had been shot. Carmody went in to take the three out of that room. It was in this room that police recovered the stolen police gun. Anderson in a statement made after the occurrence stated both he and Satchel had weapons.

Plaintiffs attempted to prove that Fred Hampton had been drugged before the occurrence and that he was murdered by an officer or officers while lying prostrate on his bed in the back bedroom. However, there was no evidence whatsoever that in any way placed any of the defendants near Hampton on the day and evening before he was killed. The evidence concerning drugs in his blood was hotly contested; but the whole question of drugs was irrelevant except to explain his drowsiness and the difficulty in awakening him that was testified to by Deborah Johnson, Harold Bell and Louis Trueluck. Deborah Johnson testified Hampton had a .45 that he kept loaded by his bed. Plaintiffs did not prove that Hampton was shot after other occupants of the back bedroom had left the room. All of the evidence establishes that Fred Hampton was on the north side of the bed in the south bedroom and that Deborah Johnson was south of him. The evidence is conclusive that he was shot

three times and that he was dead when Deborah Johnson and Louis Trueluck left the bedroom.

Experts were called by plaintiffs and defendants on the question of whether Hampton was drugged. The evidence showed that Dr. Eleanor Berman, a toxicologist at Cook County Hospital, who testified that secobarbital was in Fred Hampton's blood, was in error according to the testimony of Dr. Morton Mason, toxicologist from the Forensic Institute, University of Texas, and Leo Gormley, toxicologist, Chief of the FBI Laboratory, and a report by George Christopolous, toxicologist for the Cook County Coroner.

It appeared that all the gunfire took place in about 12 minutes. The evidence showed the police officers did not wilfully violate plaintiffs' rights. Plaintiffs' evidence questioned the choosing of the early morning hour, when the surviving plaintiffs would be expected to be sleeping, for the service of the warrant. Testimony was to the effect that the neighborhood was a densely populated one and that the time was chosen to protect the neighborhood and avert violence.

A warrant had been issued on the basis of probable cause to believe there were weapons in the apartment. The officers announced they were at the door to serve the warrant. The occupants of the apartment did not respond. They did not submit to arrest. When the police officers began to force an entry they were met by gunfire. In statements following the occurrence, several of the surviving plaintiffs said they had guns and had fired or attempted to fire them. During the occurrence each of the policemen was concerned for

his own safety and that of his fellow officers. The evidence showed the officers felt themselves endangered.

The Deadlocked Jury and Directed Verdicts In Favor Of The Seven Remaining Defendants

At the conclusion of all the evidence, the 7 remaining defendants moved for a directed verdict as to each of them. The court was of the opinion that the plaintiffs had not proved their case and that the motions for directed verdicts should be granted. However, the court followed a procedure laid down by the Court of Appeals in such cases and chose to reserve ruling on said motions and to send the case to the jury. The court then heard argument before the jury, instructed the jury, and sent the jurors to the jury room for deliberation.

The jury continued to deliberate from Thursday evening until early afternoon of the following Monday. The jury reported numerous times to the court that it was deadlocked. Finally on the afternoon of the fourth full day, the court again had the jury brought to the courtroom and inquired if the jurors had arrived at a verdict. The reply was negative. The court then asked the asked [sic] the foreman of the jury if she considered it likely that with further deliberations the jury would be able to reach a verdict. The foreman replied "We do not". Outside the jury's presence the court then asked for the views of plaintiffs' counsel as to permitting further deliberations.

One of plaintiffs' attorneys expressed his view that the jury should be instructed to deliberate further.

Others of plaintiffs' attorneys stated that they believed the jury's statements that the jury was hopelessly deadlocked and suggested that the court declare a mistrial. Defendants' counsel took the position that the deliberations should be terminated but requested the court to rule on the motions of the seven defendants for directed verdicts as to each of them, previously filed and argued at the conclusion of plaintiffs' case in chief and taken under advisement by the court.

Plaintiffs did not prove their allegations that the 7 remaining defendants intentionally or negligently deprived plaintiffs of their civil rights by illegal entry, assault and battery and other illegal acts and their allegations regarding the wrongful deaths of Hampton and Clark. The court concluded that, viewing all the evidence in the light most favorable to plaintiffs, as a matter of law plaintiffs and each of them had failed to sustain their burden of proof on the issues of each and every count remaining in the plaintiffs' Amended Complaint. Accordingly, the motions of the 7 remaining defendants for directed verdicts as to each of them were granted.

Judgment in favor of the remaining 7 defendants and against all of the plaintiffs was entered together with said defendants' costs to be assessed pursuant to law.

Dismissal of Three Counts Severed Earlier For Separate Trial

The court at the opening of this trial granted State defendants' motion to sever Counts 15, 16 and 17 of

the Amended and Consolidated Complaint for trial. Plaintiff Verlina Brewer was the only plaintiff claiming under those counts. With that motion, the State defendants included an alternative motion to strike and dismiss the said three counts and the court took that motion under advisement. Shortly after conclusion of the trial, the State defendants' [sic] again filed a motion to strike and dismiss Counts 15, 16 and 17. The court considered the original motion to strike and dismiss those counts and the renewed motion and heard argument of counsel for all of the parties. Based upon the entire record of the case and upon the reasons set forth in the State defendants' motion (referred to on page 5 hereof) and upon the argument of State defendants' counsel, the court granted the motion to dismiss Counts 15, 16 and 17.

Post Trial Actions

The court in another post-trial order denied both the motion of the State defendants to make public the *in camera* proceedings during the trial concerning threats made against certain defendants and the motion of plaintiffs for disclosure of all *in camera* proceedings. In another order it provided for the keeping intact of certain weapons and evidence. Provision was made for counsel for the parties to keep intact certain exhibits other than those held by the court. Motions still pending in the case in this court to cite certain of plaintiffs' attorneys for contempt of court or which seek sanctions against them were continued for hearing until final disposition by the

United States Court of Appeals of all appeals in this consolidated case now pending or that might be taken from from [sic] any orders of this court entered prior to the date of that order.

Appeals

Numerous appeals were taken by plaintiffs during the time this case was before this court. Plaintiffs's [sic] appealed from this court's original orders in 1972 dismissing certain of the defendants. Plaintiffs sought writs of mandamus against this court. Plaintiffs motion for this court to recuse itself shortly prior to trial of this case was referred to this Court's Executive Committee and by it to another judge of this court. The motion was denied. Two of plaintiffs' attorneys have appealed this court's judgments of contempt against them. Plaintiffs' appeal of this court's grant of the motions of the 21 defendants for directed verdicts, at the close of plaintiffs' case in chief, was dismissed by the Court of Appeals. Still another petition for a writ of mandamus was denied. Following conclusion of this trial, plaintiffs filed a general appeal, now pending in the United States Court of Appeals for the Seventh Circuit.

Miscellaneous

The occurrence out of which this case arose took place on December 4, 1969 and the first of the four consolidated cases was filed on June 4, 1970; more than seven years ago. The official file of pleadings, orders, etc., fills more than an entire filing cabinet.

The depositions of approximately 60 individuals fills another. Likewise voluminous are the exhibits, including the thousands of pages of documents from the files and records of the FBI and CPD, the "mock-up" of the apartment, the ballistics exhibits, and medical evidence exhibits.

Trial of this case took 18 months and 320 trial days and the transcript of the trial alone runs into more than 37,000 pages. It would necessitate the writing of hundreds of pages if this court were to attempt to more than briefly outline the highlights of this trial. The record in this case and of this trial speaks for itself.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 1384 (Consolidated Cases)

IBERIA HAMPTON, ET AL., PLAINTIFFS

vs.

EDWARD V. HANRAHAN, ET AL., DEFENDANTS

ORDER

Plaintiffs herein have now concluded the presentation of their evidence during their case-in-chief on the issues of conspiracy and liability. This cause now comes on upon the renewed motion of the federal defendants, Marlin W. Johnson, Roy M. Mitchell, Robert T. Piper and William O'Neal, for the entry of an order dismissing plaintiffs' Amended and Consolidated Complaint (sometimes hereinafter called the "Amended Complaint"), and upon a separate motion of the four federal defendants for a directed verdict in their favor and against plaintiffs. This cause also comes on upon the motions of each and every one of the other 24 defendants herein, in which each seeks an order directing a verdict in his favor.

The court has considered said motions and the memoranda filed in support thereof, the opposition asserted thereto by plaintiffs, the applicable law, and the oral argument heard thereon. The court has heard and considered all of the evidence presented to

date and has considered all of the evidence presented by plaintiffs, with all reasonable inferences that can be drawn therefrom, viewed in a light most favorable to plaintiffs. Now, being fully advised in the premises, the court finds, concludes and rules as follows:

The court concludes, as a matter of law, that no *prima facie* case of a conspiracy or joint venture has been established as alleged in the Amended Complaint. The court also concludes, as a matter of law, that no *prima facie* case of liability has been established, as alleged in the Amended Complaint, as to certain defendants herein.

As to the Motion for Directed Verdict for State Defendants Daniel Groth, James Davis, Joseph Gorman, George Jones, Edward Carmody, John Ciszewski and Raymond Broderick

Defendants Groth, Davis, Gorman, Jones, Carmody, Ciszewski and Broderick are named as defendants in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15 and 16 of the Amended Complaint. Groth is named additionally in Count 11. In their motion said seven defendants seek directed verdicts in favor of each of them and against plaintiffs Iberia Hampton, Administratrix on behalf of the Estate of Fred Hampton, deceased (hereinafter "Hampton, Administratrix"), Fannie Mae Clark, Administratrix of the Estate of Mark Clark, deceased (hereinafter "Clark, Administratrix"), Verlina Brewer, Deborah Johnson, Ronald Satchel, Harold Bell, Blair Anderson, Brenda Harris and Louis Trueluck, as to counts 1, 2, 3 and 4; against Berlina [sic] Brewer, Deborah Johnson, Ronald Satchel,

Harold Bell, Blair Anderson, Brenda Harris and Louis Trueluck, as to counts 5, 6, 7, 8, 9, and 10; against Hampton, Administratrix, and Clark, Administratrix, as to count 14; and against Verlina Brewer, as to counts 15 and 16. Groth additionally seeks a directed verdict in his favor against Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, as to count 11.

The motions of Groth, Davis, Gorman, Jones, Carmody, Ciszewski and Broderick for directed verdicts as to counts 1 and 2 in their favor and against plaintiffs, Hampton, Administratrix, Clark, Administratrix, Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, are hereby denied. The motions of the same seven defendants for directed verdicts as to count 14 in their favor and against plaintiffs, Hampton, Administratrix, and Clark, Administratrix, are hereby denied. The motions of the same seven for directed verdicts as to count 15 in their favor and against plaintiff Brewer are hereby denied.

Plaintiffs are directed to begin their proof on damages thereon before the jury beginning at 1:30 P.M. on April 18, 1977. The defense of said seven defendants to plaintiffs' allegations in counts 1, 2, 14 and 15 will follow.

The motions of defendants Groth, Davis, Gorman, Jones, Carmody, Ciszewski and Broderick for directed verdicts in so far as they concern counts 3, 4, 5, 6, 7, 8, 9, 10 and 16 are hereby granted in their favor and against the respective plaintiffs bringing the respective counts. It is hereby ordered that judgment, together with costs, be and it is entered in

favor of each of said defendants Groth, Davis, Gorman, Jones, Carmody, Ciszewski and Broderick and against each of the plaintiffs, jointly and severally, who have sued the defendants in each of said respective counts. Likewise, the motion of defendant Groth for a directed verdict as to count 11 is hereby granted. It is hereby ordered that judgment, together with costs, be and it is entered in favor of defendant Groth and against each of the seven plaintiffs suing Groth in that count, jointly and severally.

As to the Motion for Directed Verdict for William Corbett, Lynwood Harris, Robert Hughes, Philip Joseph, William Kelly and John Marusich

The motions of defendants Corbett, Harris, Hughes, Joseph, Kelly and Marusich for directed verdicts as to count 14 of the Amended Complaint in their favor and against plaintiffs Hampton, Administratrix, and Clark, Administratrix, are hereby granted. It is hereby ordered that judgment, together with costs, be and it is hereby entered in favor of each of said six defendants and against each of said two plaintiffs, jointly and severally.

The motions of said six defendants for directed verdicts in their favor and against plaintiffs Hampton, Administratrix, Clark, Administratrix, Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, as to counts 1, 2, 3 and 4, are hereby granted. It is ordered that judgment, together with costs, be and it hereby is entered in favor of each of said six defendants and against each of the nine aforesaid plaintiffs, jointly and severally.

The motions of said six defendants for directed verdicts in their favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, as to counts 5, 6, 7, 8, 9 and 10, are hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of each of said six defendants and against each of the aforesaid seven plaintiffs, jointly and severally.

The motions of said six defendants for directed verdicts in their favor and against plaintiff Brewer, as to counts 15 and 16, are hereby granted. It is ordered that judgment, together with costs, be and it hereby is entered in favor of each of said six defendants and against plaintiff Brewer.

As to the Motions for Directed Verdict for Defendants John Mulchrone, Harry Ervanian, John Meade, Robert Kukowinski, Charles Koludrovic, David Purtell and John Sadunas

The motions of Mulchrone, Ervanian, Meade, Kukowinski, Koludrovic, Purtell and Sadunas for directed verdicts in their favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, as to counts 8, 9 and 10, in which they are named, are hereby granted. It is ordered that judgment, together with costs, be and it hereby is entered in favor of each of said seven defendants and against each of the aforesaid plaintiffs, jointly and severally.

As to the Motion for Directed Verdict for Edward V. Hanrahan

The motion of defendant Hanrahan for a directed verdict as to count 14 in his favor and against plaintiffs Hampton, Administratrix, and Clark, Administratrix, is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Hanrahan and against each of the said two plaintiffs, jointly and severally.

The motion of Hanrahan for a directed verdict as to counts 1, 2, 3 and 4 in his favor and against all the plaintiffs, namely, Hampton, Administratrix, Clark, Administratrix, Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Hanrahan and against each of the said nine plaintiffs, jointly and severally.

The motion of Hanrahan for a directed verdict as to Counts 5, 6, 7, 8, 9, 10 and 11 in his favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Hanrahan and against each of said seven plaintiffs, jointly and severally.

The motion of defendant Hanrahan for a directed verdict as to Counts 15 and 16 in his favor and against plaintiff Brewer is hereby granted. It is ordered that judgment, together with costs, be and

it is hereby entered in favor of defendant Hanrahan and against plaintiff Brewer.

As to the Motion for Directed Verdict for Richard S. Jalovec

The motion of defendant Jalovec for a directed verdict as to count 14 in his favor and against plaintiffs Hampton, Administratrix, and Clark, Administratrix, is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Jalovec and against the said two plaintiffs, jointly and severally.

The motion of Jalovec for a directed verdict as to counts 1, 2, 3 and 4 in his favor and against all the plaintiffs, namely, Hampton, Administratrix, Clark, Administratrix, Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Jalovec and against each of the said nine plaintiffs, jointly and severally.

The motion of Jalovec for a directed verdict as to counts 5, 6, 7, 8, 9, 10 and 11 in his favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendant Jalovec and against each of the said seven plaintiffs, jointly and severally.

The motion of Jalovec for a directed verdict as to Counts 15 and 16 in his favor and against plaintiff Brewer is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered

in favor of defendant Jalovec and against plaintiff Brewer.

As to the Motion for Directed Verdict for Defendants James Meltreger and Sheldon Sorosky.

The motion of defendants Meltreger and Sorosky for a directed verdict as to counts 8, 9 and 10 in their favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of defendants Meltreger and Sorosky and against each of the said seven plaintiffs, jointly and severally.

As to the Motion for Directed Verdict for Defendants Marlin W. Johnson, Roy M. Mitchell, Robert T. Piper and William O'Neal

The motion of federal defendants Marlin W. Johnson, Roy M. Mitchell, Robert T. Piper and William O'Neal for a directed verdict as to counts 1, 2, 3 and 4 of the Amended Complaint in their favor and against all of the plaintiffs, namely, Hampton, Administratrix, Clark, Administratrix, Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck, is hereby granted. It is ordered that judgment, together with costs, be and it hereby is entered in favor of said four federal defendants and against each of the plaintiffs, jointly and severally.

The motion of federal defendants Marlin W. Johnson, Roy M. Mitchell, Robert T. Piper and William O'Neal for a directed verdict as to counts 7, 8, 9, 10

and 11 in their favor and against plaintiffs Brewer, Johnson, Satchel, Bell, Anderson, Harris and Trueluck is hereby granted. It is ordered that judgment, together with costs, be and it is hereby entered in favor of said four federal defendants and against each of said seven plaintiffs, jointly and severally.

The motion of federal defendants Marlin W. Johnson, Roy M. Mitchell, Robert T. Piper and William O'Neal for a directed verdict as to count 14 in their favor and against plaintiffs Hampton, Administratrix, and Clark, Administratrix, is hereby granted. It is ordered that judgment, together with costs, be and it hereby is entered in favor of said four federal defendants and against each of said two defendants, jointly and severally.

The court has hereinabove granted the motion of the federal defendants Johnson, Mitchell, Piper and O'Neal for a directed verdict. Therefore the renewed motion of said federal defendants for the entry of an order dismissing plaintiffs' Amended Complaint as to them is moot.

The court hereby reserves its ruling upon the question of attorneys' fees until after the return of all verdicts herein and the entry of all final judgments herein.

ENTER: J. S. Perry
Judge

Dated: April 15, 1977

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action File No. 70 C 1384

Cons. 70 C 2371
3026
3029

IBERIA HAMPTON, ET AL.

vs.

EDWARD V. HANRAHAN, ET AL.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable ————————, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Court finds as a matter of law that the plaintiffs and each of them have failed to sustain their burden of proof on the issues of each and every count remaining in the plaintiffs amended complaint, accordingly the defendants motion for a directed verdict in favor of each and every defendant and against each and every

plaintiff is granted and judgment is entered herein together with costs against each and every plaintiff and in favor of each and every defendant.

Dated at ———————————, this 20th day of June, 1977.

H. STUART CUNNINGHAM

Clerk of Court

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 23, 1979

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

No. 77-1698

IBERIA HAMPTON, ET AL., PLAINTIFFS-APPELLANTS

v.

EDWARD V. HANRAHAN, ET AL.,
DEFENDANTS-APPELLEES

No. 77-1210

UNITED STATES OF AMERICA, EX REL.
HONORABLE JOSEPH SAM PERRY, APPELLEE

v.

JEFFREY H. HAAS, Attorney at Law,
CONTEMNOR-APPELLANT

No. 77-1370

UNITED STATES OF AMERICA, EX REL.
HONORABLE JOSEPH SAM PERRY, APPELLEE

v.

G. FLINT TAYLOR, Attorney at Law,
CONTEMNOR-APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70-C-1384

JOSEPH SAM PERRY, Judge

Opinion by Judge Swygert.

Judge Fairchild concurring.

Judge Pell dissenting in part, concurring in part.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that:

The contempt judgments are REVERSED. The directed verdicts are REVERSED and the judgments

of dismissal VACATED, except for the claims against Purtell, Koludrovic, Sorosky, and Meltreger, and all but the section 1986 claims against Ervanian and Kukowinski. The judgments of dismissal with respect to the claims against Purtell, Koludrovic, Sorosky, and Meltreger and all but the claims under 42 U.S.C. § 1986 against Ervanian and Kukowinski are AFFIRMED. The judgments for costs against plaintiffs are REVERSED. Costs on appeal and attorneys' fees are awarded to plaintiffs against all nonprevailing defendants. Cause No. 77-1698 is REMANDED, with instructions.

All the above is in accordance with the opinion of this court filed this date.

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SUPREME COURT, U.S.

No. 79-912
79-914

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1979

MARLIN JOHNSON, et al.,
Petitioners,

vs.

IBERIA HAMPTON, et al.,
Respondents.

EDWARD V. HANRAHAN, et al.,
Petitioners,

vs.

IBERIA HAMPTON, et al.,
Respondents.

BRIEF FOR RESPONDENTS ANDERSON, BELL, CLARK, SATCHEL, & TRUELUCK IN OPPOSITION TO DEFENDANTS' PETITIONS FOR WRITS OF CERTIORARI

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I. STATEMENT OF THE CASE

Just before dawn on December 4, 1969, fourteen Chicago police officers, members of a special detachment assigned to the office of Cook County State's Attorney Edward V. Hanrahan, raided an apartment in a black ghetto neighborhood on the west side of Chicago, where plaintiff-respondents (hereinafter referred to as "plaintiffs"), members of the Illinois Chapter of the Black Panther Party, were asleep. Armed with a floorplan of the apartment, provided by an undercover agent working in the FBI political counterintelligence program (COINTELPRO), and acting on the pretext of a search warrant for legally-purchased weapons, the officers burst into the apartment, firing as they came. Fred Hampton, the dynamic and outspoken Deputy Chairman of the BPP for Illinois, and Mark Clark, a party captain from Peoria, were killed; and four other party members, all teen-agers, were seriously wounded and permanently injured.

Ballistics evidence showed that the police fired between 90 and 99 shots; the occupants of the apartment one at most, a shot apparently fired by Clark as he fell mortally wounded from police fire. There was a pattern of cross-fire from an M-1 carbine and a Thompson sub-machinegun, fired through bedroom walls at the location where the floorplan showed Hampton's bed. Plaintiff Harold Bell, a veteran of two combat tours of duty in the war in Vietnam, testified that the raiders moved with swift precision to vantage points inside the apartment, setting up cover fire, and had total control of the premises in a matter of seconds. Fred Hampton died from two pistol shots through his brain, never rising from the bed in which he lay in an apparently drugged sleep.*

The raid and the killings caused a fierce public outcry in Chicago and across the country. Members of the Afro-American Patrolmen's League, after

*Rather than to submit a complete recitation of the evidence, we have as Appendix A the complete Summary of Evidence which we filed in the Seventh Circuit as part of our Appellate Brief. Comparison of this Summary of Evidence with the Statements found in defendants' petitions for certiorari will confirm that their "facts" are highly selective; stated in the light most favorable to them, and often the product of the defendants' potent imagination.

examining the apartment, called the killings "an obvious political assassination", and demanded an investigation. So did the National Association for the Advancement of Colored People, the Mayor of Hampton's home town, and the Congressional Black Caucus, several of whose members came to Chicago to attempt to investigate the event. Many hundreds of people from the community waited in line in the cold during the next days, to tour the apartment and see for themselves the pattern of bullet holes from the murderous fire of the police. Some five thousand people attended Hampton's funeral, where he was eulogized by Rev. Ralph Abernathy, Rev. Jesse Jackson, and other black leaders, while hundreds more stood outside in sub-freezing temperatures to listen to the services on loudspeakers.

The police announced immediately that the Panthers had opened fire when they approached the apartment, and they had fired in self-defense. Defendant Hanrahan held a press conference within hours of the raid, and denounced the "immediate, violent, criminal reaction of the occupants of the apartment, which emphasizes the extreme viciousness of the Black Panther Party." He extolled the "good judgement, considerable restraint, and professional discipline" of his officers, and pointed to a .45 caliber handgun with which he claimed Hampton had fired three times at the police. Hanrahan also said that all of the survivors, who had been arrested and brutalized by the raiders, would be prosecuted for attempted murder of the police. One officer, who had apparently been grazed by a pellet from the shotgun fire of another, and a second, who had cut his hand breaking a window, were paraded before the press and extensively interviewed as wounded heroes, and gave gripping, totally false accounts of the "hell" they had been through in the raid.

In the next days, however, the voices of the survivors began to be heard, and the physical evidence to be seen, and the horrifying truth, that the raid was a planned, deliberate political assassination of Hampton, began to be apparent.* Hanrahan, in a desperate attempt to stem the tide of

*The editor of the Chicago Sun Times, James Hoge, refused to run an article by a reporter who had been to the scene in which he challenged the police version of the events, until he was finally persuaded by the reporter to go to the apartment, and was appalled by what he saw.

publicity and demands for official investigation from all over the country, granted an "exclusive" interview to reporters from the Chicago Tribune, in which he put forward an elaborately false story of what happened, and provided photographs purporting to show bullet holes from shots fired by the Panther occupants. When these were checked by Sun Times reporters, the alleged bullet holes proved to be the heads of nails which had been driven into a door frame, and the rest of the ballistics evidence was seen to be totally at odds with the story purveyed to the Tribune by Hanrahan.

Hanrahan also arranged with CBS news to stage a reenactment of the raid, on a "set" specially constructed in his office for the purpose of convincing the public that his men were telling the truth. The officers and cameramen spent a whole day rehearsing and re-shooting the scenes, as was shown on parts of the film which were edited out of the final version, and it was aired both locally and nationally on December 11. Again because of the fact that no trace of Panther fire could be found, save for the one wild shot fired by Clark as he fell dead; and because the raiders continued to insist they had been fired upon, the broadcast raised more questions than it answered.

In response to growing public outcry, U.S. Attorney General John Mitchell in late December announced a Special Federal Grand Jury investigation pursuant to 18 U.S.C. 241, to be headed by Jerris Leonard, then the head of the Civil Rights Division of the Department of Justice. Post-Watergate investigations have revealed that Leonard at the time was also in charge of a secret interagency spying operation, which had as one of its main targets black ghetto organizations such as the Black Panther Party (CIA Commission Report, June 1975, pp.116-125). The federal Grand Jury inquiry was based on an investigation carried out by members of the Chicago office of the FBI, under the direction of the Special Agent in Charge, defendant Marlin Johnson. Johnson was also in charge of the Bureau's COINTELPRO operations in Chicago, and had supervision of the undercover agent, William O'Neal, who had supplied the floorplan and the alleged information about the weapons which was the basis for the purported warrant.

Johnson himself testified before the Grand Jury, but did not mention the FBI's crucial role in the raid, despite being asked to describe their involvement.

In early January, the raiders first presented their stories under oath, amid much publicity, at a Special Coroner's Inquest, before a handpicked "blue ribbon" jury. Defendent Groth denied that he had a floorplan of the apartment, that he knew Hampton frequented the apartment, and that Hanrahan was involved in the pre-raid planning--three crucial claims which he later had to admit were false. Defendant Sadunas, the police firearms examiner, testified at length concerning his alleged findings that two shotgun shells had been fired from a gun the raiders said had been held by plaintiff Brenda Harris, findings which critically supported the defendant's stories, and which later were also proven false. The jury found the killings to be "justifiable homicide", basing their determination on the fact that the plaintiff survivors of the raid, who still had false charges of attempted murder pending against them, refused to testify. On January 30, a Cook County Grand Jury returned a multi-count indictment for attempted murder and various other felonies against the surviving Plaintiffs. The indictments, by Hanrahan's own admission, were largely based on the testimony of Sadunas, Groth and the other raiders.

In late February, FBI firearms expert Robert Zimmers informed defendant Sadunas that Sadunas had made a crucial misidentification, and that the two shot shells identified as fired by Brenda Harris were in fact fired from defendant Ciszewski's gun. Hanrahan was informed of the misidentification in early March, and Sadunas confessed his error before the federal Grand Jury. On May 8, 1970, Hanrahan finally dismissed the indictments against the survivors, purportedly basing his dismissal on Sadunas' change in testimony.

On May 15, the federal Grand Jury issued its final report finding that the raiders had given "grossly inaccurate and distorted accounts" of what happened, which gave "basis for public doubt of their credibility;" and that the wide variance between what they said and what the physical evidence showed raised the question of whether they had deliberately falsified their stories. It said the raid was "ill-concieved" and "not professionally planned or

properly executed and the result was two deaths, four injuries and seven improper criminal charges." The jury felt the police could easily have evacuated the apartment and made arrests without firing a shot, and that the police department's internal investigation into charges of misconduct was "so seriously deficient that it suggested purposeful misfeasance." Report of the January 1970 Grand Jury, pp. 117, 118, 122, 126. See Appendix E.

Despite this, Mr. Leonard, after consultation with Attorney General Mitchell, did not permit presentation of any proposed indictments of the officers to the grand jury for a vote. Some five years later, through discovery, plaintiffs received a document (Pl #24) Hampton II, at 620, fn. 18, which showed that a deal had been struck between Hanrahan and Leonard in consultation with defendant Marlin Johnson in early April, before much of the evidence had even been presented to the Grand Jury. The terms of the deal assured Hanrahan that he and the raiding officers would not be indicted, and he in return would drop his indictments of the surviving Panthers in the state court. The unwritten "quid pro quo" from the FBI's point of view was, of course, Hanrahan's continued silence concerning the FBI's role in setting up the raid. See generally, Hampton II, at 617-20.

* * * * * * * * *

The raid, as the evidence clearly showed, had been brought about in large part by FBI agents operating under the "counterintelligence" program, whereby the Bureau had organized its self-ordained mission of protecting and preserving political orthodoxy in the American body politic, by means of secret operations designed for the repression of dissidents, especially black dissidents.

The earlier stage of the Bureau's campaign against the black freedom movement, during the 1960's, had most notably included operations aimed at furthering the rift within the Nation of Islam between the Honorable Elijah Muhammed and Malcolm X,** and Director Hoover's remorseless and obsessive personal vendetta against Dr. Martin Luther King.***

A major COINTELPRO policy memorandum**** called on FBI field office

*The report also strongly criticized Hanrahan's special police detachment, pointing out that it improperly mixed police and prosecutorial functions. The same month, the Unit was disbanded, and the raiders were returned to regular police assignments. Grand Jury Report, at 116.

**See FBI memos, Chicago to Headquarters, 1/29/69, 8/29/69.

***See Senate Select Committee on Intelligence, Final Report, pp. 79-183.

****FBI memo of 3/4/68, Plaintiffs' Exhibit #2.

personnel to "prevent the rise of a 'messiah' who could unify, and electrify, the militant black nationalist movement," and named King, Rap Brown, and Stokley Carmichael, and the fallen Malcolm X as targets and examples. The memo was issued barely a month before Dr. King was assassinated in Memphis, and signaled a major escalation in the FBI's committment to their thoroughly racist, often lethal, and always completely unconstitutional goals.

In Chicago by early 1968, Fred Hampton, then only 19 years old, had become the leader of the youth branch of the NAACP in the racially-torn suburb of Maywood, Illinois. Under his leadership, the youth organization grew from seventeen to seven hundred members, and began to actively organize against racial discrimination and police brutality. (Tr. 29164,32412-19) It was at this early stage that Defendant Piper and the FBI first officially targeted Hampton under COINTELPRO, and attempted to obtain a wiretap at his mother's house. (Pl. 69, 313)

In late 1968, just after the FBI ordered their COINTELPRO agents to redouble their efforts to "cripple the Black Panther Party" (Pl. #6), Hampton and Chicago Student Non-Violent Coordinating Committee leader Bobby Rush founded the Illinois Chapter of the Black Panther Party. It quickly became one of the strongest BPP chapters, building a large Free Breakfast for Children Program, and taking strong public stands on the war in Vietnam, the draft, police brutality and the right of black people to armed self defense, and the need for socialism in America. Hampton worked hard to forge alliances with Black, Latino and Appalachian white organizations, and had begun a significant effort to convince several large Chicago "street gangs" to stop warring with each other, and turn their attention to dealing with the oppression of black people.

Hampton spoke frequently before large crowds, often attacking State's Attorney Edward Hanrahan and his transparently racist "war on gangs," while eloquently expounding the politics of the BPP.* The FBI countered by having Hampton arrested on his way to a television appearance and attempting to

*His moving speaking style has been recorded on several audio and videotapes which were admitted into evidence at trial and by a full length movie, "The Murder of Fred Hampton" by Michael Gray, of "China Syndrome" fame, which won an award at the Cannes Film Festival.

entice alleged gang leader Jeff Fort to take violent action against Hampton and other Panther leaders. (See below, p.14) In April, 1969, Hampton was sentenced to 2-5 years in the penitentiary for allegedly stealing $71.00 worth of ice cream bars, immediately after Hanrahan had led a personal publicity campaign against the sentencing judge for his alleged leniency in another case.

He was released on appeal bond by order of the Illinois Supreme Court in August, 1969, and the Chicago BPP Chapter, which the FBI recognized had floundered in his absence, came back to life, as more than 300 people celebrated Hampton's return with a rally at a West Side church.

Once out of jail, Hampton continued to provide his gifted leadership, and redoubled his speaking and organizing efforts. Under the guidance of Ronald "Doc" Satchel a pre-med student and the Illinois BPP Minister of Health, the chapter organized the first BPP free medical clinic, which opened shortly after Hampton's death. Hampton led daily demonstrations protesting the gagging of Bobby Seale during the Conspiracy Trial, and the FBI focused even more attention on him. In November, after Hampton journeyed to the West Coast, O'Neal reported that he was in line for promotion to national leadership in the Party. Also in November, the Illinois Supreme Court denied Hampton's appeal, and he was scheduled to return to prison by the first of the year.

In late November, Hampton convened a statewide leadership conference in Chicago. Plaintiffs Mark Clark and Harold Bell, leaders in Peoria and Rockford, respectively, came to Chicago for the meeting, and stayed at Hampton's apartment; as did Brenda Harris, a diminutive 18-year-old University of Illinois student, Verlina Brewer, a 17-year-old from Ann Arbor who had come to Chicago to learn about the medical program; and Deborah Johnson, a 19-year-old college student, eight and one-half months pregnant with Fred Hampton, Jr. Also staying at the apartment that night were Blair Anderson, a 19-year-old converted "street gang" member and Louis Trueluck, an ex-prisoner who had befriended Hampton while he was in the penitentiary.

Brenda Harris was shot in the hand and the leg as she lay on a bed in the frontroom, just as the raiders entered the front door. Anderson, Brewer

and Satchel were riddled with fire from Defendant Gorman's machine gun while they lay huddled on the floor of the middle bedroom. Brewer was permanently crippled by a shot which shattered her knee, Satchel suffered multiple wounds of the abdomen which necessitated removal of a large portion of his colon, and Anderson was shot in the leg and penis. Bell, Trueluck and Ms Johnson were dragged to the kitchen, handcuffed, and thrown to the floor, where they were cursed at, kicked and beaten by a number of officers. Mark Clark was shot through the heart by Officer James "Gloves" Davis the moment he broke open the front door and entered the living room. Hampton, as mentioned, was shot twice in the head as he lay in a drugged stupor, probably by Officer Carmody, who entered the rear bedroom to administer the coup de grace, and then dragged the body out into the dining room. (See generally pp. 37-48, Plaintiffs' Appellate Brief, and citations therein, attached as Appendix A.)

* * * * * * * *

In June and December, 1970, the plaintiffs filed four damage actions against the raiding officers, State's Attorney Hanrahan, his assistant, Richard Jalovec, who helped plan and supervise the raid, and several additional police and state's attorney's personnel who participated in the subsequent cover-up. The City of Chicago, its Mayor and Superintendent of Police, and the County of Cook were also named. The complaints, under 42 U.S.C. 1983, 1985, 1986, and 1988, alleged violations of the First, Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendments, and conspiracy, and

also included pendent state claims for wrongful death, assault and battery, false arrest, and malicious prosecution. Plaintiff Brewer, a Michigan resident, also alleged diversity jurisdiction under 28 U.S.C. 1332. The complaints were consolidated before U.S. District Court Judge Joseph Sam Perry.

Public indignation was strongly regenerated by the "whitewash" effect of the Justice Department's failure to obtain indictments of the raiders from the federal grand jury. Acting upon the petitions of several legal and community groups, the Chief Judge of the Circuit Court of Cook County appointed Chicago attorney Barnabas Sears as Special Prosecutor, and Sears proceeded to present evidence to a Special Cook County Grand Jury. The Grand Jury voted to indict Hanrahan, certain raiders, and other officials involved in the coverup, for conspiracy to obstruct justice. They deadlocked on a ten to ten vote and thus did not include a count of attempted murder. Judge Joseph Power, a close associate and former law partner of Mayor Daley, refused to publish and file the indictments, however, and the Illinois Supreme Court ordered them released on August 23, 1971. (See People ex rel. Sears v. Power, 49 Ill. 2d 14, 273 N.E.2d 380 (1971). People ex rel. Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 705 (1972). The case was finally tried in the summer and fall of 1972. Judge Philip Romiti, a democrat sitting without a jury, entered a directed finding of acquittal at the close of the prosecution's case, barely a week before the election for State's attorney, causing one of the assistant special prosecutors to call the trial "fixed" (Chicago Daily News, April 8, 1971, p. 11). The next week, irate Chicago citizens voted Hanrahan out of office, electing Bernard Carey as State's Attorney. It was later learned that a long time confidential agent of the Mayor's, Jack Clark, had been planted in the prosecutor's camp, and was reported to have attempted to install a secret microphone in the Grand Jury room. (Chicago Sun Times, 5/20/71, 5/13/73, p. 1, 5/10/73, p. 2.)

Discovery in Plaintiffs' civil rights case was stayed by the District Court while the criminal case was pending. On February 3, 1972, Judge Perry issued an order dismissing all defendants except the 14 police officers who participated in the raid itself. Hampton v. City of Chicago, 339 F.Supp. 695 (N.D. Ill. 1972). The Court held that Hanrahan and his assistant State's

Attorneys were judicially immune for all activities before and after the raid, and that the City and County were not "persons" under 42 U.S.C. 1983 and hence not amenable to suit. He held that the Mayor and Police Superintendent were not alleged to have been personally involved, and that there was insufficient showing that police personnel who participated in the coverup had caused any constitutional deprivation to the Plaintiffs.

Plaintiffs appealed this ruling to the Seventh Circuit, and, on August 24, 1973, the Court issued an opinion affirming in part and reversing in part. Hampton v. City of Chicago (Hampton I), 484 F.2d 602 (7th Cir. 1973). Judge (now Mr. Justice) Stevens, writing for the Court, held that defendants Hanrahan and Jalovec were not immune from suit for "planning a raid in order to obtain evidence of criminal activity," because such functions were "investigative, police functions," not covered by the immunity afforded to prosecutors. The Court held further that the allegations against officials involved in the coverup "raised questions of fact," and reversed their dismissal. Dismissal of the City, County, Mayor, and Police Superintendent was affirmed. After the opinion was issued, plaintiffs moved the Court of Appeals to include in its mandate a direction that the case be re-assigned to another District Judge. Noting that "massive discovery loomed," and that the trial would be "long and arduous," they asked the higher Court to remove this "grueling burden" from a senior judge they said had clearly shown his "predilection against the plaintiffs," and an "animus against their case." This motion was denied.

In December of 1973, the Commission of Inquiry Into the Black Panthers and the Police, chaired by Roy Wilkins and Ramsey Clark, issued their Report on the December 4th raid. It made, inter alia, the following findings:

> -Whatever their purpose, those officials responsible for planning the police action and some who directly participated acted with wanton disregard of human life and the legal rights of American citizens.
>
> -There can be no possible legal or factual justification for this police use of firearms. There was no "shoot out." The police did virtually all, if not all, of the shooting and most of it blindly. If the one shot that can be attributed to a Panther was fired, and was fired first, it could not justify the more than eighty shots that were fired by the police. If any of these shots were fired in the mistaken belief that they were being fired in response to fire from the Panthers, that such a belief was entertained by police officers would evidence the inadequacy and consequent irresponsibility in planning and control of an operation involving the use of lethal force.

-State's Attorney Edward V. Hanrahan's statements that the police acting under his authority "exercised good judgment, considerable restraint, and professional discipline," and that "The immediate, violent criminal reaction of the occupants in shooting at announced police officers emphasizes the extreme viciousness of the Black Panther Party," render him unworthy of public trust.

-Systems of justice--federal, state, and local--failed to do their duty to protect the lives and rights of citizens.*

Search and Destroy, A Report by the Commission of Inquiry Into the Black Panthers and the Police, Metropolitan Applied Research Center In Harper and Row. 1973, pp. viii, 14. Appendix F

The Report went on to find that "there is probable cause to believe that Fred Hampton was murdered--that he was shot by an officer or officers who could see his prostrate body lying on the bed." Id., at 246. The Commission also stated its opinion that:

> the federal grand jury Report of the raid was inadequate--inadequate not only as a substitute for indictments but also as an exposition of what happened during the police action. The Report has every quality of a whitewash. Two people were dead and four seriously injured. Police had fired scores of rounds of ammunitior; Panthers had fired one shot, at most. Assistant Attorney General Jerris Leonard, who headed the federal investigation, had led members of the Commission of Inquiry with whom he met in Justice Arthur Goldberg's office in early 1970, to believe that indictments would be forthcoming. Instead, there was an insufficient report and no legal action.
>
> Id., at 152-3

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*Other findings which the Commission made:

> -The search warrant for the premises, assuming it was legally supportable, could have been executed in a lawful manner with no significant risk to life.
>
> -The hour of the raid, the failure to give reasonable warning to the occupants, the overarming of the police, the wildly excessive use of gunfire, all were more suited to a wartime military commando raid than the service of a search warrant.
>
> -It is not safe to entrust enforcement of the laws to authorities who permit the use of a machine gun the way the Chicago police did during the episode.
>
> -Many statements made after the episode by participating police officers, such as that of Sergeant Groth that "Our men had no choice but to return their fire," are not credible.
>
> -The failure of the Chicago police and other state and local officials to employ basic investigative practices such as fingerprinting, preserving evidence, examining all firearms, sealing the premises, and examining and photographing the bodies before removing them, as well as gross errors on the part of these officials in ballistics, autopsy, and other examinations, are professionally inexcusable and can only undermine confidence in the competence and integrity of the police and the legal system.
>
> -The "exclusive" account of the police action given by State's Attorney Hanrahan's office to the Chicago Tribune, and the filmed re-enactment of the episode by police for CBS-TV, demeaned public office, misinformed and prejudic ed the public, and violated professional ethics.
>
> Id., at viii

Also in late 1973, the state defendants petitioned this Court for certiorari, raising, inter alia, the questions of whether defendant Hanrahan's pre-raid planning was covered by absolute immunity, and whether a sufficient post-raid conspiracy had been alleged against certain defendants. In early 1974 this Court denied the petition. City of Chicago v. Hampton, 415 U.S. 917 (1974).

* * * * * * *

While the case was on appeal, the Government revealed that defendant William O'Neal, a Chicago Black Panther member, was in fact an undercover operative and informant. O'Neal, who had participated with a Chicago police officer, Stanley Robinson, in an alleged "murder-for-hire" ring, was surfaced as a key witness against Robinson in a prosecution for deprivation of civil rights. See U.S. v. Robinson, 503 F.2d 208 (7th Cir. 1974); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1978). In the fall of 1973, after testimony in which he admitted to participating in at least one murder, O'Neal was given a new identity and relocated by the Government. Also during this time period the FBI, pursuant to a Freedom of Information Act suit filed by NBC reporter Carl Stern, released the first COINTELPRO documents, revealing that, in 1969, the FBI had operated a secret program of political repression, designed to "expose, disrupt, misdirect, discredit and otherwise neutralize" so-called "militant black nationalist" organizations. (Plaintiffs' Exhibits 1 and 2)

After remand, the plaintiffs subpoenaed FBI documents pertaining to the December 4th raid. In early 1974, O'Neal was deposed at a secret site, and admitted to having communications with the FBI concerning Hampton's apartment just prior to the raid. A few months after the deposition, the FBI, after promising a "truckload" of documents, produced 34 documents, and swore these were all the documents "relevant" to the raid, the plaintiffs, and the Chicago Black Panther Party.*

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*Rather than reciting the entire history of what the Circuit Court below aptly described as the "defendants' obstruction of justice, suppression of documents, and dilatory tactics," we attach the factual summary of these events, which was part of our Appellate Brief, as Appendix B.

Among these was the floor plan of Hampton's apartment, marking the bed where Hampton slept, drawn by O'Neal and his control agent, defendant Roy Mitchell. An accompanying memo stated that it was provided to the Cook County State's Attorney's Office, just prior to the December 4th raid. The plaintiffs then pursued further discovery, deposing special agent Mitchell, his supervisor on the Chicago FBI "Racial Matters" squad, Robert Piper, and Special Agent in Charge (SAC) Marlin Johnson. Although these deponents refused to answer questions concerning COINTELPRO, the plaintiffs nonetheless developed enough evidence to join O'Neal, Mitchell, Piper and Johnson as defendants in the conspiracy, in an amended and consolidated complaint filed on December 3, 1974, which alleged that the FBI defendants' motivation, and intent was embodied in the COINTELPRO program.*

In the Spring of 1975, the District Court ordered a severance of the federal defendants from the case against the state defendants, effectively neutralizing the plaintiffs' conspiracy claims. The plaintiffs filed a petition for a writ of mandamus in the 7th Circuit, protesting the severance, and raising certain discovery issues, including the adamant refusal of defendant Daniel Groth, a police sergeant who had been in command of the raiding party, to reveal the identity of a purported second informant upon whose information he swore he was relying in his affidavit seeking the search warrant which was the pretext for the raid. The District Court had asked him what his response would be to a direct order to disclose the name. After he said he would refuse, the Judge denied the plaintiffs' motion to compel.** On May 27th, the Court changed his mind about the severance. On May 29th the Court of Appeals dismissed the Petition, citing mootness as to the severance, and saying that, at this stage of the case, it could not say the District Judge had abused his discretion with respect to discovery matters.***

During 1975, the plaintiffs repeatedly sought to discover FBI documents relevant to their case, especially COINTELPRO documents from the Chicago

*Named as "usued co-conspirators" in the amended complaint were then Attorney General John Mitchell, FBI Director J. Edgar Hoover, and Justice Department Officials Jenis Leonard, Will Wilson, Robert Mardian and Robert Woheide. (Amended and Consolidated Complaint, Par. 56)

**We have attached our recitation of the facts relevant to the Groth informant issue, also filed in our Appellate Brief, as Appendix C.

***At this time, much of the evidence that Groth did not have an informant was still hidden in the FBI files.

office files. In March, the federal defendants delivered a packet of COINTELPRO documents, ex parte and in camera, to the trial judge at his house. He found them "irrelevant," and returned them to the Government. In late 1975 the Senate Select Committee on Intelligence and the Rights of Americans (The Church Committee), publicly released some Chicago COINTELPRO documents concerning the BPP, including a document in which the FBI defendants wrote that the December 4th raid was part of COINTELPRO (Pl. #25), and a series of documents which revealed attempts by FBI defendants to induce Chicago "street gang" leader Jeff Fort to take violent action against Hampton and the Chicago BPP by sending Fort an anonymous letter saying the Panthers had a "hit," i.e., a murder contract, out for him. (Pl. #9-11) These documents were among those deemed "irrelevant" by Judge Perry in his in camera review.

Armed with this information plaintiffs again moved for production of Chicago COINTELPRO documents, in December, 1975, but the District Court denied the motion before the Defendants even had a chance to respond. On December 19, 1975, the District Judge privately told a U. S. attorney previously assigned to the case that the plaintiffs would "never prove the FBI killed those fellas."*

On January 5, 1976, the plaintiffs' belated motion to add Jerris Leonard and John Mitchell and COINTELPRO architects William Sullivan and Charles Brennan, the estate of J. Edgar Hoover, and other high-level officials as additional defendants was denied without prejudice, and the plaintiffs were forced to trial without ever having seen the great bulk of their documentary evidence of conspiracy against the FBI defendants.

On January 27, 1976, after the jury was chosen, the Court changed his earlier ruling and ordered that the FBI produce all of its COINTELPRO files concerning the BPP, as well as all files on the named plaintiffs and informant William O'Neal. The government began to produce these files as plaintiffs went ahead with their first witness, defendant Marlin Johnson. Johnson's testimony became in effect a discovery hearing before the jury, as the plaintiffs

*In October of 1975, the plaintiffs moved, pursuant to 28 U.S.C. 144 to recuse Judge Perry, who after first flying into a rage and refusing to permit the motion to be filed, later transferred the motion to Judge William Lynch, another former law partner of Mayor Daley, who denied it. Recusal was twice renewed in the spring of 1977, after the dismissal of Hanrahan and the FBI defendants.

each day received new COINTELPRO documents, highly relevant to their claims, which had been authored, approved and sent by the witness. In mid-February the government attorneys, in the presence of their FBI clients, repeatedly represented to the Court that they had produced the complete FBI files on O'Neal and the Plaintiffs, documents totalling approximately 500 pages.

In early March, while defendant Roy Mitchell was on the stand, he inadvertently revealed that the FBI defendants and their government attorneys had in fact withheld some parts of the files. After a week of stalling by the federal defendants, the Court directed the government to bring in the complete original files which had been ordered produced two months before, and FBI agents appeared in the courtroom pushing carts piled high with more than 125 volumes, perhaps fifty times the number of pages that had been repeatedly called "everything" by the assistant U.S. Attorneys and Department of Justice lawyers. The documents were turned over to plaintiffs in redacted form over the next ten weeks. The trial court denied plaintiffs' motion for a mistrial, and refused even to continue the trial so that they could review the 25,000-odd pages which were now turned over. Plaintiffs were thus compelled to examine the other FBI defendant-witnesses in front of the jury in the daytime, while reading the documents at night. More than 50% of the FBI documents ultimately introduced in evidence by plaintiffs at trial were among those deliberately withheld, including two "smoking gun" items, in which defendants Piper and Mitchell, in a memo to FBIHQ, claimed credit for the raid, admitted that defendant Groth did not have a separate informant, and sought a bonus for defendant O'Neal for his work in setting up the raid. (Pl. #83,* 91) Testimony by FBI agents revealed that defendant Piper had the actual supervision of the process within the FBI by which the files had been culled for documents to produce and not produce.

The relevation of this massive withholding received wide public attention in Chicago, and there was a demand for an impartial investigation of the coverup, spearheaded by two black state legislators, Senator Richard Newhouse and Representative Harold Washington, Roy Wilkins of the NAACP, and the Chicago Council of Lawyers. The U.S. Attorney's Office instead announced its own investigation of the matter. The plaintiffs moved for sanctions against the federal defendants and their attorneys, pursuant to Rule 37, including con-

*See Appendix G.

tempt and default judgment. The Court refused to hold a hearing, and deferred ruling until after the trial.

After this appeal was decided, documents were released by the U.S. Attorney's office under the Freedom of Information Act which show that the Judge, in April, 1976, wrote three ex parte letters to the United States Attorney and the Department of Justice, informing them that he intended to rule in favor of the FBI defendants and their lawyers, declaring them blameless, and urging that the investigation be ended.* The FBI defendants refused to cooperate in the investigation, and it was quietly dropped. Plaintiffs' Petition for disciplinary action against Judge Perry, filed in November, 1979, after the letters were finally released, has been taken under advisement by the Court of Appeals. (Court of Appeals order 11/20/79)

The Church Committee issued its Final Report in early May, 1976, concluding that, under COINTELPRO, the FBI "in essence took the law into its own hands, conducting a sophisticated vigilante operation against domestic enemies" ..."aimed squarely at preventing the exercise of First Amendment rights of speech and association;" and that it was a case of "a law enforcement agency turned into a law violator." The Committee said many of the "no-holds-barred techniques" employed "may have violated criminal statutes," "involved risks of serious bodily injury or death to the targets," and

> would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.
>
> Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, April 23, 1976, p. 3, 410.

In a chapter of the Report entitled "The FBI's Covert Action Program to Destroy the Black Panther Party," it was stated that "the chief investigative branch of the Federal Government, which was charged by law with in-

*The Judge did not issue his order on sanctions --which tracked the conclusions in his letters--until April of 1977. The defendants therefore were fully and secretly informed by the Court of his ruling on a crucial issue before him a full year before he actually ruled. See plaintiffs' motion of 11/14/79. (See Appendix H.)

vestigating crimes and preventing criminal conduct, itself engaged in lawless tactics and responded to deep-seated social problems by fomenting violence and unrest." (Ibid, at p. 189). It said:

> We have been able to establish beyond doubt, however, that high officials of the FBI desired to promote violent confrontations between BPP members and members of other groups, and that those officials condoned tactics calculated to achieve that end. It is deplorable that officials of the United States Government should engage in the activities described below, howerer dangerqus a threat they might have considered the Panthers; equally disturbing is the pride which those officials took in claiming credit for thebloodshed that occurred. (Ibid)

Upon a careful study by the staff of the Bureau's operations against the BPP in Chicago,* the report said that the Bureau's actions in sending the anonymous letter to Jeff Fort, warning of a so-called "hit" intended by the Panthers, was a prime example of its indifference to the dangers its operations created. (Ibid, at 195-98) The raid itself was cited as indicative of the Bureau's practice of enlisting the "cooperation of local police deaprtments in its covert action programs to disrupt and neutralize the BPP...by encouraging raids on the homes of BPP members." (Id., at 220-23)

On May 30, 1976, the Judge, in another off-the-record communication, told a minister from Maywood that the conspiracy between Hanrahan and the FBI charged by the plaintiffs was "impossible," and that there was "no earthly way" the plaintiffs would ever prove it.

The trial continued to be highly charged with the effects of Judge Perry's bias against the plaintiffs and their lawyers, blatantly encouraged by the tactics of defense counsel. Plaintiffs' attorneys Haas and Taylor were both held in contempt, and spent time in the Metropolitan Correctional Center, on citations which were reversed by the Court of Appeals in a decision not challenged here;** (See 600 F.2d at 644-648) and the Court continued to countenance the obstructive tactics of the defendants and their lawyers.

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*In December of 1975 the Committee moved before the District Court for access to Hampton discovery materials and documents, which had already been produced, and this request was granted.

**Taylor was cited once earlier in the trial when he supposedly spoke out of turn, but the citation was later vacated.

During the trial, apparently without limit on the amount they could spend, the defendants purchased four sets of "hourly" copy from the official reporters. The City and the County each paid $3.00 of the taxpayers' money per page, and the government paid $2.50 per page for one copy and $.25 for a second copy. The Court also received a copy, which was presumably paid for at the regular rate.

The District Judge refused to order that plaintiffs, who were poor and working people, and whose counsel had labored without compensation since the beginning of the case, be given a free copy or allowed to photocopy the Court's transcript. Ultimately, counsel learned from the reporter that the bargain by which he was paid a total of $8.75 per page for the "hourly" transcript (which in fact was delivered twice daily, at noontime and about 6:00 p.m.) was conditioned on his promise to counsel for the state defendants that he would not provide the plaintiffs with copy for anything less than $3.00 per page.*

The trial judge permitted plaintiffs' counsel to use his copy of the transcript, but only while the Court was in session; and he often withdrew this "privilege" when he was displeased. Informed of the flim-flam wherein each government paid separately for the transcript, he not only refused to conduct any inquiry, but actually entered an order approving it. The taxpayers, therefore, paid roughly $290,000.00 for the trial transcript. See plaintiffs' motion for contempt and sanctions, November 11, 1976, and Appendix I.

In early April, 1977, the plaintiffs concluded presenting evidence after the Court, reneging on an earlier promise to the contrary and despite the fact that plaintiffs received many important FBI documents written and approved by the federal defendants after they had testified, refused to permit them to be recalled. On April 15, 1977, the Court, after giving the plaintiffs five days over the Easter weekend to answer 300 pages of motions for directed verdict submitted by the defendants, granted them all except as to the seven police officers who admitted firing their weapons at the apartment. In a companion order, he completely "exonerated" the federal defendants

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*Counsel have no information as to how much the reporter received for his regular attendance at Court and for the Judge's copy of the transcript, over and above the hourly copy fee.

and their attorneys for their massive coverup, without hearing evidence on plaintiffs' motion for santions. His order paralleled his ex parte letters to the government the year before.

The seven "shooter" defendants then proceeded to present their defense. After evidence was concluded, the Court struck the plaintiffs' claim for punitive damages, only to reinstate it when plaintiffs filed yet another mandamus petition in the Seventh Circuit. The case went to the jury on Friday, June 17, 1977. On Saturday, June 18th, the jury first reported that they were deadlocked. The Court did not inform plaintiffs' counsel until Monday, June 20th, when the jury again informed him that they were "hopelessly deadlocked." He then declared the jury hung, and, instead of declaring a mistrial, granted a defense motion and denied plaintiffs' motion for leave to proceed in forma pauperis on appeal. On July 28, 1977, after Notice of Appeal had been filed, the trial judge issued his bizarre and unexampled "Summary," purporting to set forth his rationale in granting the directed verdicts. The Court of Appeals elected to consider the Summary as his opinion on the directed verdicts, and held that it showed he had erroneously considered the evidence in the light most favorable to the defendants.

On August 25, 1977, the Court of Appeals, by order of Judges Fairchild, Swygert, and Pell, granted the motion to proceed in forma pauperis, and relieved plaintiffs of the insurmountable burden of posting an appeal bond. Plaintiffs filed their brief on January 4, 1978; the defendants filed their responses in May, and plaintiffs' Reply was filed in June. Sitting in special session, the Court heard 3½ hours of argument on August 14, 1978. Judge

*As they did in the trial, the state defendants have gone to great lengths in their petition, attempting to create the impression that there was real evidence to support their claim that they were fired upon by the occupants of the apartment. (St. Pet. pp. 17-38, 40-42.) In fact, there is nothing but the sheerest speculation about possibilities, all of which were contradicted by the fact that none of the defendants were hit while in the doorways they try so hard to suggest that the occupants shot through without hitting anything; the testimony of the raiders who stayed outside and said no shots came out; the testimony of the raiders who entered, fixing locations of the occupants in places where they could not have fired without leaving impact points inside; the findings of the FBI ballistics expert, who considered and rejected each alleged impact point put forward by the defendants, and concluded that the occupants fired only one shot; and finally, the sworn trial tesimony of all of the plaintiffs that none of them fired a weapon that morning. (For a further discussion of this evidence, with transcript citations, see pp. 37-48 of the Statement of Facts, in plaintiffs' Brief in the Court of Appeals, as Appendix A.)

Swygert was given special dispensation from his caseload to carefully examine the 40,000 page record, and prepare the majority opinion. While the Appeal was pending, the FBI publicly released numerous additional documents pursuant to the Freedom of Information Act, several of which were highly relevant to plaintiffs' claims, but had never been turned over to the plaintiffs.* The Appellate briefs were supplemented with these documents. On December 15, 1978, Chief Judge Fairchild issued an Order providing that Judge Perry, along with fellow senior judge Julius Hoffman, would henceforth be prohibited from taking on any cases in which the trial was expected to last more than twenty-five hours.

* * * * * * *

As of September 12, 1979, when the Court of Appeals announced its denial of the various petitions of the defendants for rehearing, the Treasurer of Cook County and the Comptroller of the City of Chicago had paid out a total of 1.6 million dollars in public funds as fees and expenses for legal representation of the police officers and State's Attorneys named as defendants in the case. The cost to the federal government of defending the three FBI agents and their paid informant was reliably estimated at $485,000, including some $36,000 paid to defendant O'Neal for his services as a witness in the trial.**The county monies have been paid to a special assistant state's attorney, John Coghlan, and his assistant, Joe Witkowski, who had been hired by the County Board after representing Hanrahan in the criminal trial, and after Hanrahan's successor, Bernard Carey, determined that there would be a conflict of interest if his office were to represent Hanrahan and the others in the civil case. Another attorney from the defense team in the criminal trial, Camillo Volini, was similarly retained as a special assistant corporation counsel by the City of Chicago to represent the police officers.

*Several of these were appended to plaintiffs' reply brief and included in one 1963 COINTELPRO document which called for "removing black militant leaders from the scene by arrest, police, or court action."

**For a complete summary of these fees and costs, see Appendix I.

Special Assistant State's Attorney Coghlan, since his appointment in 1973, has submitted regular billing statements to the trial judge, ex parte, usually every month. These are then forwarded to the County Treasurer, accompanied by actual orders from the Court, finding them to be proper and appearing to direct that they be paid.

These billings have recently included a charge of some $25,000.00 for the Coghlan/Witkowski share in preparation of the defendants' 26-page petition for rehearing of the appeal, and more than $43,000.00 for the 4-month period ending November 30, 1979. The instant petition was filed in mid-December, 1979. Thus, the bills so far received do not include work done in December, 1979, during the last two weeks of preparing the defendants' petition for certiorari; and likewise do not include the fees for the special Corporation Counsel, who we have always understood is the main draftsman of the joint pleadings the state defendants always submit.

The District Judge had never, insofar as we can ascertain, raised the slightest question of the propriety of the total bills submitted to him for approval by the special assistant State's Attorney; and has gone on regularly applying his imprimatur to this looting of the public coffers despite having lost all jurisdiction of the case almost three years ago.* Including other "hidden" costs, such as the salary of a police officer assigend full time as an "investigator" for the state defendants--to say nothing of the salaries of the police defendants themselves, who were apparently detailed to the courtroom throughout 18 months of trial--the cost to the taxpayers for the last six years of official stonewalling of the truth about December 4th by three governments appears to have run easily to the neighborhood of $2.5 million dollars. (Appendix I.)

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*On January 29, 1980, by draft order he approved Mr. Coghlan's $43,000. bill. (See Appendix I.)

II. OPINION OF THE COURT BELOW

The Court of Appeals issued its opinion on April 23, 1979. Hampton vs. Hanrahan 600 F. 2d 600 (7th Cir., 1979). The majority opinion, written by former Chief Judge Luther Swygert and concurred in by Chief Judge Fairchild included the following holdings:

1) The trial court in granting directed verdicts, erroneously considered the evidence in the light most favorable to the defendants rather than the plaintiffs, improperly weighed the evidence and the credibility of witnesses, and invaded the province of the jury. Hampton II at 608, 625. The Court of Appeals, "considering all the evidence in the light most favorable to the plaintiffs, disregarding conflicting, unfavorable testimony, and extracting all reasonable inferences," reversed the directed verdicts as to almost all the defendants, and almost all plaintiffs' claims. Id.

2) The Plaintiffs made out a prima facie case of two conspiracies, the first covering the planning and preparations for the raid and the raid itself, and being "designed to subvert and eliminate the Black Panther Party and its members", with the "common plan being the raid." Hampton II at 621, 22, 24. The second conspiracy consisted of the "alleged coverup of evidence regarding the instigation, preparation and execution of the raid and the post-raid legal harassment of the plaintiffs". It was "intended to frustrate any redress the plaintiffs might seek, and more importantly, to conceal the true nature of the preraid and raid activities of the defendants involved in the conspiracy:" and "to continue an unfounded prosecution." Id. at 621-22, 628. The Court further held that it could not presently determine whether plaintiffs might be able to show one continuing conspiracy on retrial, because discovery had been "hampered unduly" by the trial court. Id. at 622.

3) Defendants Hanrahan and Jalovec, were acting in a police-type investigative capacity, rather than their judicial role as prosecutors, in planning the raid, and were therefore entitled only to qualified immunity under Imbler vs. Pachtman, 424 U.S. 409 (1976). Further, the two were not absolutely immune for their "post-raid publicity campaign," but would have such immunity for their prosecutorial role in initiating and continuing the malicious prosecution

against the plaintiffs. Id. at 631-35. The Court also afforded the federal defendants only a qualified immunity under the rule of Butz v. Economou, 438 U.S. 478 (1978).

4) The federal defendants and their attorneys "deliberately impeded discovery and actively obstructed the judicial process", "repeatedly disobeyed Court orders to produce documentary materials," engaged in "dilatory and obstructive tactics," and "suppressed evidence." Id. at 628, 641. The Circuit Court ordered a hearing, on remand, to determine "what if any sanctions should be imposed against the federal defendants and their attorneys for their suppression of evidence."--Order of 12/12/79, at p. 3 (Attached as Appendix J.). Hampton II at 642,649.

5) The defendant's obstructionist tactics "regrettably " were permitted by the trial court, who "repeatedly exonerated the federal defendants for their derelictions," "wrongfully impeded the plaintiffs' presentation of their case" by his "restriction on discovery and his questionable evidentiary rulings," and, rather than " applying sanctions against the defendants and their counsel, instead assessed costs against the plaintiffs for the government's time" in reproducing the withheld documents. Id. at 608, fn. 6, 622, 641.

6) These actions by the defendants and the trial court "had a crippling effect on the Plaintiffs' case," and "denied plaintiffs the fair trial to which they were entitled." The Court concluded that:

> (i)f there were any doubts about the sufficiency of the evidence when considered under the applicable standard constituting a jury question on liability, the delay of the federal defendants in meeting their obligations to produce relevant documentary material would supply a basis for an inference that plaintiffs were unable to present all the available evidence and thus were denied the opportunity to prove their case. Id. at 639, 641-42.

The Court held that plaintiffs shall be afforded complete discovery on remand. Id. at 642.

7) Although the trial court "resisted the plaintiffs' efforts to develop a record", there was "considerable evidence" supporting plaintiffs' contention that Sergeant Groth did not have a separate informant, as he swore in the search warrant; that such an admission would be "powerful evidence" in

support of plaintiffs' claims of conspiracy, bad faith, and violation of the Fourth Amendment; and that, if there actually were a second informant, knowledge of his/her identity as a possible co-conspirator would still be crucial to the plaintiffs' case. Id. at 637-38. The Court found further that the trial court had ignored the standard set in Roviaro vs. U.S., 353 U.S. 53 , (1957), when he refused to order Groth to reveal the identity of his purported informant. Applying the Roviaro balancing test the Court of Appeals directly ordered that Groth must reveal his purported informant's identity, under appropriate protective order, upon remand. Id. 637, 639.

9) The conduct for which plaintiffs' attorneys Haas and Taylor were held in contempt by the trial court did not interfere with the conduct of the trial, or obstruct the administration of justice; rather the trial court's prejudicial and vindictive actions caused the attorneys "to reach the breaking point of their patience and forbearance," and the contempt citations were "unwarranted when considered in their factual setting." Id. at 644-48, 647-48.

10) The plaintiffs, pursuant to 42 U.S.C. 1988 were to be awarded attorneys fees for the appeal, since they prevailed, as part of the defendants' costs. The Court held that if plaintiffs establish liability on retrial they should collect fees in the District Court, for the first trial as well. Id. 643-44. The Executive Committee of the District Court, under Rule 18, is directed to reassign the case to another judge, who should give the retrial "high priority".

Judge Pell concurred in the reversal of the directed verdicts as to the seven police defendants who fired their weapons, agreed that attorneys fees should be awarded to the plaintiffs for prevailing on appeal to that extent, and joined in the direction that a hearing should be held on the issue of discovery sanctions against the F.B.I. defendants and lawyers. He dissented from the remainder of the decision, with a bitter political broadside condemning the Black Panther Party, extolling the general virtues of law enforcement and its response to the Panthers, and heaping opprobrium on plaintiffs' attorneys.*

*Footnote on following page.

Several petitions for rehearing were filed. When the Department of Justice declined to seek rehearing on the issue of discovery sanctions, and the contempts, the U.S. Attorney's Office and the trial judge, respectively, filed for rehearing on these issues. Two of the eight active Circuit Judges recused themselves from consideration of the petitions, as they had from the case in chief, apparently because of earlier affiliation with the Department of Justice and the local United States Attorney's office. The Court denied the petition for rehearing, voting 6-0 on the directed verdict against the shooting policemen , and 3-3 on the other issues raised.

Pursuant to the Court's decision, plaintiffs' attorneys calculated the time expended on this appeal and petitioned the Court to set the amount of their appellate fees. The undersigned, attorneys for the "Clark plaintiffs," requested payment for some 3600 hours of work, at rates from 40-90 dollars per hour, in the amount of $288,172.50 ; and asked the Court to employ a "multiplier" to enhance the award, on the basis of the complexity and unique public importance of this case. James Montgomery, attorney for the "Hampton plaintiffs," requested payment for 1835.75 hours of work, for a total of $111,056.25, and also requested a multiplier.**

On December 12, 1979, the panel issued an order, joined in by all three judges, setting the amount of attorneys fees. The Court found that the

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*(From preceding page.) Subsequent to the order denying rehearing, the undersigned plaintiffs, after learning belatedly that Judge Pell was a former F.B.I. agent who had been for 30 years a member of the powerful F.B.I. lobbying group, the Society of Former F.B.I. Agents, moved that he be recused from all further proceedings, and that his dissent be stricken. Judge Pell denied the motion on November 15, 1979.

**In contrast, lawyers for the City and County defendants alone, had billed their respective taxpayers for 6840.4 hours for their work in losing the appeal, for which they were paid in full: The total cost to the taxpayers for representation of the defendants in the Court of Appeals alone was approximately $400,000.00.

plaintiffs had achieved

> substantial success on the merits of the appeal, including the reversal of the directed verdicts, the right to discover the alleged informant's identity, a hearing to determine what sanctions, if any, should be imposed against the federal defendants and their attorneys for suppressing documentary evidence, and consideration of plaintiffs' outstanding discovery demands on remand; (and therefore found that the plaintiffs) were prevailing parties, (since) any other construction of the (Civil Rights Attorneys' Fees Award) Act would frustrate its basic rationale. Order of 12/12/79, at p.3(Appendix J)

The Court halved the Clark plaintiffs' lawyers' hours and rates and awarded them $72,215.00. The Court reduced by three-quarters the hours submitted by co-counsel and awarded $27,695.00, also at a rate of $40 per hour. The Court further ordered that the award was assessed against the defendants in their official capacities, two-thirds to be born by the ity and County, and one-third by the federal government. The defendants have moved for rehearing to challenge for the second or third time the Court's finding that plaintiffs had "prevailed" within the meaning of the statute and the case; and the United States of America has asked for leave to intervene, in order to challenge the granting of the fee award against the federal defendants in their official capacities.

III. REASONS TO DENY DEFENDANTS' PETITIONS

The defendants are asking this Court to review twelve separate issues, the majority of which are variously stated pleas for absolute immunity. Some of these are straightforward; others, such as the federal defendants' argument concerning the Supreme Court's holding in Butz v. Economu, and the state defendants' argument about good faith (Point VIII), are disguised as claims for qualified immunity. All the arguments are consistent, however, in that the proper standard for directed verdict, and the powerful, conflicting evidence introduced by the plaintiffs at trial are wholly ignored; throughout, the defendants discuss the evidence very selectively, in the light most favorable to themselves.

In their cluster of spurious immunity claims, the defendants not only disregard the weight of the strong factual record and the legal standards of directed verdict; they also attempt to evade the effects of the Court's holding that plaintiffs were denied a fair trial, and the opportunity to fully prove their case, therfore necessitating a new trial, even if the proof had been insufficient. In making these arguments, as the Circuit Court noted, the defendants seek to "expand radically the parameters which the Supreme Court has set for the doctrine of official immunity." Hampton II, at 631.

In Point III the state defendants seek absolute immunity for prosecutors Hanrahan and Jalovec for their role in the pre-raid planning conspiracy. They claim that all these defendants did was draft and authorize a search warrant, and that this was an advocacy function, immune under Imbler v. Pachtman, 424 U.S. 409 (1976). The Court of Appeals correctly found, however, that the plaintiffs had proffered enough evidence showing that these defendants engaged in a conspiracy in planning the raid, designed to eliminate the BPP and to otherwise violate the constitutional rights of the plaintiffs, and, that, as part of the planning, they knowingly obtained a fraudulent warrant. The Court therefore found that the plaintiffs had made out a prima facie case that these defendants had acted in an investigative, police capacity, a form of activity expressly excepted by this Court from the

*We have addressed the defendants' points, both in this section, and in the individual arguments in the following order: A=St. Defts.' Point III; B=St. Defts.' Pt. X; C=St. Defts.' Pt. V; D=St. Defts.' Pt. I; E=St. Defts.' Pt. IV; F=St. Defts.' Pt. VIII; G=St. Defts.' Pt. VI; H= St. Defts.' Pt. VII; I=St. Defts.' Pt. II; J=St. Defts.' Pt. IX; K=Fed. Defts.' Pt. II; and L=Fed. Defts.' Pt. I and St. Defts.' Pt. XI.

immunity doctrine set forth in Imbler, at p.430 fn.31.

In Point X these same state defendants, Hanrahan and Jalovec, seek absolute immunity under the rule of Barr v. Matteo, 360U.S. 564 (1959), for their role in the post-raid conspiracy, and for those post-raid acts not associated with their prosecution of the plaintiff survivors.* These acts consisted of a media blitz after the raid, which the Court found violated plaintiffs' First, Fifth and Fourteenth Amendment rights, as well as causing them extreme pre-trial prejudice with respect to the charges lodged against them by Hanrahan. The Court correctly held that such public statements were not immune under Imbler, since they were not part of the prosecutor's function. Nor is there a conflict with this Court's decisions in Paul v. Davis, 424 U.S. 693 (1976) or Barr v. Matteo, supra, because here the plaintiffs proffered sufficient evidence that they had suffered constitutional harm from these conspiratorial acts.**

In Point I the Internal Investigations Division defendants, police officers Mulchrone, Meade, Ervanian and Kukowinski, seek absolute immunity from 1985 and 1986 liability for their role in the cover-up. They portray themselves as administrative judges, performing a judicial function which they argue should entitle them to the absolute immunity afforded in Butz. To grant such immunity here, where the investigation was admittedly a "whitewash", with no hearing, adjudication or any other aspect of a judicial process, and where those seeking the immunity have no judicial autonomy whatsoever, would be a gross and totally unjustified extension of Butz, and would likewise effectively overrule this Court's holding in Pierson v. Ray, 386 U.S.

*The Court did find these defendants absolutely immune, under Imbler for those post-raid acts--obtaining indictments, presenting evidence to the Grand Jury and striking a deal with federal prosecutor Jerris Leonard--which it said attached to their advocacy function as prosecutors.

**In Point V the defendants argue that defendants Hanrahan and Jalovec should not be individually liable under §1983 for their actions prior to the raid, because they were acting as supervisors. In fact, the Court grounded its decision on the direct involvement of these defendants in the raid. They chose some raiders whom they knew had long records of brutality, and others who had an obvious revenge motive; they approved the timing of the raid and the weapons to be taken, Hampton II, at 627. The Court's decision therefore was not based on respondeat superior which is precluded in 1983 actions by Monell v. Department of Social Services, 436 U.S. 568 (1978), but on these defendants' direct supervisory involvement in the events.

547 (1967).

In Point IV the state defendants seek absolute immunity for the raiders for their involvement in the cover-up after the raid, on the grounds that some small part of the evidence upon which the Court relied in finding a prima facie case against them was based on their Grand Jury testimony. Their argument is based on dicta in Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926), summarily affirmed, 275 U.S. 593 (1927) and an approving reference thereto in Butz, to the effect that witnesses should receive absolute immunity from liability based on their testimony. Even if this Court were to determine that this dictum is the law, it would not affect the decision of the Circuit Court, because the Court relied on much independent evidence showing these defendants' involvement in the post-raid conspiracy and their individual liability for post-raid acts,rendering the Yaselli argument doubly meaningless. Additionally, even if these defendants could not be liable for what they said before the Grand Jury, their testimony is admissable to prove the conspiracy, as long as there is proof of additional non-immunized overt acts by them, and such proof is plentiful.

* * * * * * *

In addition to these straightforward, if spurious, immunity pleas, several more of defendants' points likewise put forth concepts designed to absolve them of liability regardless of the facts and the evidence. Thus in Point VIII of the state petition, it is argued in the same breath that, on the one hand, because plaintiffs did not call certain defendants as witnesses, they therefore did not prove their bad faith; and, on the other, that their bald denials establish good faith as a matter of law. Defendants argue that the Court of Appeals wrongfully imposed on them the burden of proving good faith, because no case of their bad faith was made out. In point of fact, the Court quite rightly found that plaintiffs fully made out their claims of bad faith, thus properly shifting the burden to defendants to rebut this showing. As to those defendants not called by plaintiffs, the Court correctly found that the documents, admissions, and prior testimony

were enough for a prima facie case.* The Circuit Court also examined the proof under the test in Wood v. Strickland, 420 U.S. 308 (1975), and found that it satisfied plaintiffs' burden. Similarly, as to the defendants who did testify, the Court said it was for the jury to decide whether the raiders "shot Hampton deliberately after (the survivors) had left the bedroom." Hampton, at 625; and whether Hanrahan and Jalovec participated in a conspiracy by planning an illegal raid designed to eliminate the BPP, and a later post-raid conspiracy to cover up, and to unconstitutionally harass the plaintiffs. As the Court found, the defendants' denials only created jury questions. To claim that good faith has been established here is but another bold attempt to obtain absolute immunity for their acts.

The state defendants in Point VI argue that no racial or other class-based animus was proven against them, because they had never heard of COINTELPRO, and this was the only proof of such animus. The Court below correctly recognized that COINTELPRO as shown in the documents, constituted valid proof of conspiratorial motive, intent, and animus for the federal defendants who were acting under it. The Court relied on other proof showing animus in Hanrahan and other state defendants. This included Hanrahan's creation of a special Unit, pursuant to his politically motivated "war on gangs" whose primary function was to "investigate" the BPP and other black organizations; his admission that he planned the raid to counteract the BPP's "anti-police propaganda" and "further the image of law enforcement;" his unremitting post-raid publicity campaign, and prosecutorial attack on the surviving plaintiffs and the BPP; his approval of the tactics and timing of the raid itself in which the police officers under his command fired blindly through thin plaster walls at people who were asleep in bed, and inflicted beatings and racial abuse on the survivors while Fred Hampton lay before them on the floor in a pool of blood. The record therefore quite amply supports the Circuit Court's holding that there was sufficient proof of a "comingling of racial and political motives," (Id., at 623) to go to the jury on the issue of the state defendants' animus.

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*See, e.g., the IID defendants' admissions that their investigation was a "whitewash," and was designed to suppress conflicting evidence; and the Court's finding that defendant Sadunas' conduct in misidentifying two crucial shotshells was enough to require the jury to determine whether it was a result of "conspiratorial design" or "professional incompetence." Hampton, at 629.

In Point VII the defendants make the ludicrous claim that the Court of Appeals, in holding that plaintiffs had sufficiently made out their claims of conspiracy under Sec. 1983, ruled in conflict with this Court's decisions in Chapman v. Houston Welfare Rights, ___ U.S. ___ 60 L.Ed. 2d 508 (1979), and Adickes v. Kress, 398 U.S. 144 (1970), because plaintiffs had not shown any violation of their substantive constitutional rights. The Court below correctly found that these defendants, both individually, and as part of the conspiracies, violated, inter alia, the plaintiffs' First, Fourth, and Fourteenth Amendment Rights and these conclusions are convincingly supported by the record. Chapman, where the plaintiff sought simply to vindicate a right under the Social Security Act, with no claim of constitutional deprivation, has absolutely no applicability here. The defendants/seek reversal of Adickes which strongly supports the in fact, plaintiffs, and to bar conspiracy claims under 1983 altogether. Such a claim cannot be supported, by Chapman, or any other precedent of this Court.

In Point II the state defendants also raise the issue of whether the Circuit Court was correct in ordering Defendant Groth to reveal, under protective order, the identity of his alleged informant. In raising this argument, the defendants again ignore the evidence proferred by plaintiffs and relied upon by the Court. This evidence showed that four of the six key planners of the raid have at some time or another admitted that Groth had no separate informant, thereby establishing the strong possibility that Groth perjured himself in the warrant affidavit. The defendants also ignore the Circuit Court's painstaking and correct application of the balancing test established by this Court in Roviaro v. United States, 353 U.S. 53 (1957); its finding that revelation of this alleged informant (or the revelation of his non-existence) is "essential to a just determination of the plaintiffs' case," specifically their 4th Amendment, conspiracy, and bad faith claims, and the careful limitation of its holding to the unique and compelling facts of this highly significant case. Despite the careful analysis of the Court of Appeals, the defendants spuriously argue for application of the test in Franks v. Delaware, 438 U.S. 154 (1978). The test developed in Franks was designed by this Court to set guidelines for determining when a criminal/defendant may "go behind" a search warrant on the issue of probable cause. But, even if the standard and rationale of Franks is grafted onto the Roviaro test, as the defendants ask, the Court's decision below is enhanced

rather than undermined, since the "independent" portion of Groth's warrant is supported only by "misrepresented triple hearsay," (Hampton, at 538) allegedly supplied by an informant (O'Neal) who the evidence at trial showed was "unreliable" under existing laws. Further, these very state defendants admitted at trial that they knew when drafting the warrant that the "O'Neal information," by itself, was insufficient to establish probable cause. Additionally, the rationale behind Franks, i.e., guarding against perjured warrants by police officers is certainly served by the Circuit Court's decision.

* * * * *

In a claim which is perhaps not as outrageous, but equally as spurious as the others, the state defendants argue in Point IX that the en banc procedure of the Seventh Circuit conflicts with 28 USC 46 and the norms of this Court because two active judges recused themselves from consideration of defendants' rehearing petitions. Defendants assert that those judges should have voted at least on the question of rehearing despite their recusal or, in the alternative, that they should have been replaced for that vote by judges from outside the Circuit. These arguments are without merit. It would defeat the very purpose of recusal for a disqualified jurist to vote in the case from which he or she had withdrawn. As to defendants' alternative argument, the language of 28 USC 46 expressly forbids judges from outside the Circuit to vote on rehearing petitions.

In fact, a statutory quorum of the majority of judges in regular active service on the Seventh Circuit voted on and rejected defendants' petitions for rehearing. The procedure followed below, which should be left to the sound discretion of the Circuit Court, provided the defendants with full consideration of their petitions and violated no statute or norm set by this Court.

* * * * *

The federal defendants, by arguing for application of the qualified immunity of Butz v. Economou in the circumstances of this case are in reality insisting on absolute immunity for their actions. At the heart of their argument is the outrageous premise that their bald denials of unconstitutional conduct must be accepted as true, regardless of the proof which is introduced against them; and that these denials, as a matter of law, insulate them from a jury

determination of their fate. As the Circuit Court found, the plaintiffs introduced a prima facie case, with some of the most damning evidence coming from the defendants' own files, that the FBI defendants participated in a conspiracy to eliminate the BPP as "a vital, radical black political organization," as part of their illegal COINTELPRO program. As part of the conspiracy, and with unconstitutional motive and intent, they instigated and participated in the planning of the December 4th raid, by, inter alia, having five to seven pre-raid conversations with the state defendants and supplying the most crucial instrumentality of the raid itself--the floor plan. They internally ratified their own crucial role in the raid and its unconstitutional, lethal result, after the fact, covered up their role in federal and state investigations, and continued this cover-up at least through the trial itself. Despite this powerful evidence which strongly contradicts their denials, despite the law of this Court which instructs that the issue of motive and good faith is singularly one for the jury, and despite the holding of the Court below, unchallenged here, that they and their lawyers suppressed evidence and obstructed justice during the proceedings in the trial court, these defendants still claim that they are to be excused from any liability or obligation to answer for what they did.

These defendants would strip the rule set down in Butz of all its meaning in order to gain absolute immunity for their conduct. Their argument, as dangerous as it is ingenuous, must be soundly rejected.

* * * * * * *

Both the federal and state defendants also challenge the Circuit Court's award of $100,000 in attorneys fees to plaintiffs, claiming that the plaintiffs were not prevailing parties. The state defendants further argue that the award inhibits their "access to the Courts," and that the plaintiffs were not acting "in the public interest." The Court below correctly found that the plaintiffs had "succeeded on a significant issue" in the course of this litigation; and thereby awarded interim fees. The Circuit Court's determination that the plaintiffs have "prevailed" is in complete conformity with the express legislative history of the Civil Rights Attorneys Fees Award Act, which provides that interim awards are "particularly important in protracted litigation," and may be granted "where a party has prevailed on an important matter in the course of litigation." (H.R. Rep. No. 94-1558 94th Cong. 2nd Sess. 8, S. Rep. No. 94-1011

94th Cong. 2nd Sess.) Here, after ten years of litigation, the plaintiffs have been awarded fees for the work on this appeal. By prevailing on discovery issues, obtaining a sanctions hearing, and assuring that the case will be decided by a jury, theplaintiffs have indeed succeeded on significant issues. Further, while ultimate liability has not yet been established, the Court of Appeals has found that the defendants have violated federal law by obstructing justice and disobeying court orders, and the defendants have not challenged that finding here. Likewise, the Court determined that plaintiffs presented "serious evidence of gross state and federal misconduct." Hampton II, at 638-39. Further, the plaintiffs and their lawyers were forced to endure a bootless and agonizing trial, fatally and obviously flawed from its very inception, largely, as the Circuit Court found, because of the defendants' "dilatory" and "obstructionist" tactics. Plaintiffs were then required to litigate a massive appeal, on issues primarily the product of government misconduct, simply to recover their elementary right to a fair trial.

Additionally, this is a case of extreme importance and significance, both in Chicago and nationally. Those government officials with a sworn obligation to vindicate the rights of the plaintiffs and the public, are either defendants herein or have abdicated their responsibilities--leaving only the efforts of plaintiffs' lawyers, who have fought without compensation for ten years to unearth the whole truth concerning December 4th and bring it to the public. Conversely these defendants have been represented by lawyers paid by public funds--with over 2.1 million dollars already spent for their defense. It is therefore hard to imagine a more appropriate circumstance for the Circuit Court to have followed the express legislative intent of 42 U.S.C. 1988 in granting interim fees.

Despite the long petitions filed by the defendants' lawyers, who will no doubt collect handsomely for their work, they raise no issues worthy of this Court's review, as we will more completely demonstrate in our arguments below.

IV. ARGUMENT

A. THE CIRCUIT COURT BELOW CORRECTLY APPLIED THIS COURT'S HOLDING IN IMBLER V. PACHTMAN TO THE EVIDENCE ADDUCED AT TRIAL, FINDING THAT THE ACTIONS OF DEFENDANTS HANRAHAN AND JALOVEC IN PLANNING AN UNCONSTITUTIONAL RAID, AND OBTAINING A FRAUDULENT WARRANT WAS AN INVESTIGATIVE RATHER THAN ADVOCACY FUNCTION.

The Defendants urge that "the decision below is contrary to the express and implied ruling in Imbler v. Pachtman and its progeny," (state defendants, Point III)* and disingenuously pose the issue as whether defendants Hanrahan and Jalovec should have absolute immunity for "authorizing, drafting and/or reviewing the application for the search warrant. Whatever the status of such acts by a prosecutor, the plaintiffs did not make such limited allegations, and the proof presented at trial cannot be so narrowly construed. The Court of Appeals, in its earlier decision, held that

> The conduct of Hanrahan and Jalovec in planning the raid may be described in various ways. At one extreme the complaints may be read to charge that they deliberately planned to have the police officers kill Hampton and Clark. Even without the allegation of improper political or racial motivation, it is plain that no immunity would apply under that reading. Regardless of his motives, the prosecutor certainly may not order subordinates to kill or to punish a free citizen without trial. Notwithstanding the tone of these complaints, however, appellants have not urged this extreme reading on the court; we therefore do not so interpret that allegations. At the other extreme, defendants Hanrahan and Jalovec argue that they are charged with nothing more than the drafting of a search warrant which the raiding officers executed, an act which should be acepted as a traditional duty of the Attorney for the County. But we are persuaded that the planning allegations cannot fairly be read so narrowly. At the very least they charge that Hanrahan and Jalovec planned a raid in order to obtain evidence of criminal activity. Defendants argue that evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity. We find this argument unpersuasive. Even though defensible if conducted in good faith with probable cause, the State's Attorney's alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

Hampton v. City of Chicago, 484 F.2d 602, 608-09 (7th Cir. 1973), cert. denied. 415 U.S. 917 (1974). (Hampton I).

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*Defendants' issue presented for review is:

"Whether a prosecutor is absolutely immune from liability for acts done in authorizing, drafting and/or reviewing the application to a court for a search warrant, and necessary attendant acts performed within the scope of his duties and his prosecutorial capacity to carry out the order of the court commanding the search?"

In Hampton II, after a careful examination of the record, the Court held that the evidence presented supported its earlier conclusion that these prosecutors were not acting in a quasi-judicial capacity:

> In Hampton I, supra, we examined the claim of Hanrahan and Jalovec to absolute immunity for their pre-raid conduct. We concluded that their:
>
> 'alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under (their) direction.'
>
> Hampton I, supra, 484 F.2d at 609. Neither Imbler, supra, nor our fuller consideration of the issue aided by the evidence produced at trial alters that conclusion.

The Court concluded that the plaintiffs had presented a prima facie case that these prosecutors, in "instigating and preparing for the raid," had participated in a conspiract "to subvert and eliminate the BPP and its members," and that a reasonable jury could find that they and their co-defendants "agreed at least tacitly to work together to eliminate the BPP." Hampton II, at 623, 624. This conduct certainly was not and could not be protected by absolute prosecutorial immunity.*

The evidence presented at trial refutes the contention that these defendants were acting in an advocacy role, and supports the decision of the Circuit Court. The evidence definitively establishes that the defendants were participating in the planning of the raid, in which application for the search warrant was just one aspect; and generally that they were acting as police officers, at the outer reaches of even an investigatory function. The evidence showed that Hanrahan had created a special squad of nine police officers who were "detailed" to his assistant, Jalovec, who he had made chief of his "Special Prosecutions Unit" (SPU). Hampton II, at 610. He and Jalovec personally selected many of these officers, all of whom later went on the raid, after reviewing their police backgrounds. (Tr. 24831-4, 26055, Pl. #409) Several of the officers had extensive police disciplinary records. Defendant James

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*As an additional basis for liability against their prosecutors for their pre-raid actions, the Court held that plaintiffs had made a sufficient case to go to the jury under §1983 against these defendants as supervisors who actively participated in the raid preparations; under §§1983 and 1985 for certain post-raid actions; and under 42 U.S.C. §1986 for failure to prevent the implementation of the §1985(3) conspiracy. Hampton II, at 626, 627. (See Argument C , infra.)

"Gloves" Davis, who led the charge through the front door of the apartment, killed Mark Clark, and repeatedly fired his automatic rifle through the walls of the apartment, had 66 prior disciplinary complaints, a judgment against him for brutality, and a well-deserved reputation--which defendant O'Neal conceded--of "terrorizing the black community." (Pl. #580-94, Tr. 29993-94, 29653).

This elite unit was headed up by defendant Groth, who answered directly to Jalovec. It was created by Hanrahan to implement his publicly announced "war on gangs," and, in sharp contrast to the "routine matters"--such as serving subpoenas and locating witnesses in pending court cases--normally handled by police officers assigned to the State's Attorney's office, SPU carried on straight police investigative work in the black community. (Pl. #409, 413; Tr. 24943) Its investigative targets included the BPP (Tr. 24971), and Hanrahan conceded that one of its main purposes was to "sell the public" on supporting the police. (Tr. 27020). Defendant Mitchell testified that he understood one of Jalovec's main duties was to gather "intelligence" on the BPP. (Pl. #422) According to Groth, Jalovec gave almost all of the work assignments Groth never did anything without Jalovec's knowledge, and Jalovec authorized payments for SPU informants. (Pl. #413) Groth and Jalovec answered directly to Hanrahan.

The evidence also showed that Hanrahan and Jalovec both participated in planning the raid. Jalovec had five to seven meetings and conversations with Mitchell concerning the Hampton apartment in the week prior to the raid. Hampton II, at 611, fn. 12. He met with Mitchell and Groth just prior to the raid and Mitchell supplied them with the layout of the apartment; (Id.) and the Court of Appeals found that the "communications between Jalovec and Mitchell, in particular, were essential to the planning and successful execution of the raid." (Id., at 624)

Jalovec arranged for the machine gun which was taken on the raid, and discussed and rejected the possibility of making the raid at 8:00 p.m., when the apartment would be empty. (Pl. #413, Tr. 25174-75, Hampton II, at 612) Jalovec "wholeheartedly" approved of changing the time to just before dawn so that the raiders could "surprise the occupants while they were asleep." (Tr.

24527, 25448-49, 24547) He had numerous conversations with defendant Groth, and they drafted the affidavit for the search warrant together, alleging that Groth had his own informant, although the plaintiffs presented evidence that Groth, Jalovec, Hanrahan and Mitchell all were aware that this averrment was false and perjurious. (Pl. #83, 91, 413, Hampton II, at 637-38) It was Jalovec who decided that Mitchell's name would not be used in the warrant; and he was "more than likely present" when Groth went to the men selected to make the raid, and explained it to them. (Tr. 25391) He also arranged for the assignment of several additional officers from another police unit to fill out the raiding party. (Tr. 23612-16)

Jalovec and Groth admitted meeting twice with Hanrahan on December 3rd. At the first meeting, they discussed with Hanrahan all the information which they had on the apartment, including the fact that Hampton was an occupant, and that he purportedly kept a .45 there. Groth had the layout of the apartment with him at this meeting, and said he "may have" discussed the timing with Hanrahan. (25241-46) Jalovec informed him of the number of men assigned to the raid, that Groth was assigned to lead it, and had surveilled the premises. Hanrahan was also informed that the GIU* had planned a raid and then called it off, and that, "at least inferentially," such information from the FBI informant in the Panthers would not be offered again if Hanrahan failed to act upon it. (Tr. 27256-58, 27261-2) Groth testified that he left this meeting with the "distinct impression," that Hanrahan had "approved of the raid." (Tr. 25241-46, Hampton II, at 611-12)

After this meeting, the time for the raid was changed from 8:00 p.m. on December 3rd, to 4:30 a.m. on December 4th. Groth and Jalovec then drafted the warrant affidavit and Jalovec took the warrant to Hanrahan for approval, detailed the final plan for the raid, and Hanrahan said he should "tell the men to be careful." (Tr. 24529, Hampton II, at 612) Groth then took the warrant to Judge Robert Collins, Hanrahan's former First Assistant U.S. Attorney and Jalovec's former supervisor in that office.** At no time did Groth, Javlovec or Hanrahan discuss the possible use of teargas, floodlights, loudspeakers or other

*Gang Intelligence Unit of the Chicago Police Department (GIU).

**Prior to becoming Cook County State's Attorney in 1968, Hanrahan was the the U.S. Attorney for the Northern District of Illinois.

non-violent means of executing the purported warrant. (Tr. 24529, Hampton II, at 612) Hanrahan admitted that he was aware that two of the men who were assigned to the raid had been close personal friends of two policemen slain the month before in a gun battle in which an ex-Panther was also killed, and further, that one of the main reasons for approving the raid was to combat the "anti-police propaganda" of Hampton and the BPP. (Tr. 27042-6,028, 069-72)

The raid itself is further evidence of Hanrahan's and Jalovec's deep involvement in police activity over and above the mere drafting of the search warrant, and goes far beyond their advocacy function as prosecutors. Plaintiffs' evidence showed that the police, at 4:30 in the morning, did indeed "surprise" the sleeping plaintiffs. They fired 99 shots from the machine gun, an automatic rifle, pistols and shotguns. Defendant Davis killed Mark Clark and fired his carbine through walls into the rooms where the occupants slept. One of his bullets was found in Hampton's body. Hampton II, at 615 Carmody, who Hanrahan knew was close to one of the recently slain officers, entered at the back and killed Hampton. Hampton II, at 614, 625 Hampton, who never used drugs, was killed in bed, while asleep or semi-conscious, under the sedation of a large quantity of seconal. (Tr.21212-398; 23150) Officer Gorman fired several rounds through the walls with the machine gun, shooting around the figure of plaintiff Brenda Harris, who sat terror-stricken on a bed in the living room. (Tr. 18802, Hampton II, at 615) Three of the survivors were seriously wounded by machine gun fire while lying on the floor, and plaintiff Satchell suffered four wounds which required removal of a large portion of his colon. (Pl. #DW2-6, Hampton II, at 614) The pattern of the bullets unmistakably showed that firing from the back, the front, and the inside hallway converged on the spot marked on the floor plan as Hampton's bed, the same blood soaked bed from which defendant Carmody admitted he dragged Hampton's body after the shooting. (Pl. #RZ135, 21, Hampton II, at 614) When the shooting stopped, the plaintiffs were forced to walk out, despite their serious injuries, and were physically and verbally abused. (E.g., Tr. 12189, 12205, 17825, Hampton II, at 614) No tear gas, flood lights, loudspeakers, or other non-violent methods were used to obtain plaintiffs' surrender before the police opened fire.

A reasonable jury could certainly determine that defendants Hanrahan and Jalovec, by their deep involvement in the preparations for this frighteningly violent and murderous operation, had indeed been part of an unprecedented unconstitutional conspiracy by officers sworn to uphold the law. When viewed together with plaintiffs' evidence concerning these defendants' actions and statements after the raid, an even stronger case for denying absolute immunity is made.* On the morning of December 4th, Hanrahan and Jalovec had the seized weapons brought directly to their office rather than to the police crime lab, which was the normal practice. They then staged an elaborate press conference, in which Hanrahan displayed the weapons, falsely accused Hampton of firing three shots from a .45 pistol at the police officers, and completely ratified the sadistically unconstitutional results of the raid, asserting that his men had acted with good judgment, professional discipline, and considerable restraint. Hampton II, at 616 He has continued to uphold their conduct in the raid to this day. He and Jalovec both actively masterminded and implemented an all-out campaign, designed to give maximum exposure and credibility to the defendants' false version of the raid, and to hopelessly prejudice the survivors, whom he had charged with attempted murder. Id., at 626-27 This campaign included three major press conferences,

This campaign included three major press conferences,

an exclusive front page story given to the Chicago Tribune in which raiders told their story, complete with pictures furnished by the defendants which the article falsely claimed depicted evidence of Panther firing,** and a carefully staged and rehearsed television "reenactment" on CBS. Hampton II, at 616-18. He initiated a "whitewash" police IID investigation, actively solicited and used a false ballistics report which supported the defendants' version of the events, and obtained indictments based in large measure on that report. (Pl. #409, Hampton II, at 618, 620) He refused to dismiss the indictments for months after the FBI informed him of the mistake, and finally dismissed them only after the federal prosecutors promised him in return that he and his officers would not be indicted. (Pl. #24, Hampton II, at 619-20)

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*These post-raid actions constitute evidence of both their consciousness of guilt in planning the illegal raid, and their involvement in the post-raid conspiracy to cover-up. (See Argument B, below)

**One picture had several holes circled and labelled as evidence of Panther firing. Further examination of the apartment showed the "bullet holes" to be nail heads. The other picture showed a bullet-riddled door and claimed to be evidence of firing by the plaintiffs in the front bedroom. In fact, it was the door which had been riddled by "Gloves" Davis' carbine. (PL EVH2A,B)

By May of 1970, Hanrahan disbanded his unique police Unit, and the defendant raiders were returned to regular police assignments.* (Pl. 3409)

* * * * * * *

Plaintiffs' evidence, viewed in the light most favorable to them, clearly establishes much more than the simple drafting and approval of a search warrant, and places these defendants far beyond the boundaries of their "advocacy function." In fact, it shows that they far exceeded even a legitimate police function. The defendants' claim that they were merely drafting and approving a search warrant is their defense. Since it is sharply contradicted by the plaintiffs' evidence, the Court of Appeals was entirely correct in holding that they were not entitled to absolute immunity, or a directed verdict.

The defendants rely heavily on the recent case of Forsyth v. Kleindeinst, 599 F.2d 1202 (D.C. Cir. 1979), claiming that its holding conflicts with the decision here. The defendants claim that Attorney General John Mitchell's action in placing a warrantless wiretap on Forsyth's telephone is analagous to their obtaining the search warrant, which, therefore, according to Forsyth, should be considered as part of the prosecutor's "quasi-judicial" function which is absolutely immune. This argument is wrong for several reasons. First, the Seventh Circuit's decision in Hampton I, as reaffirmed in Hampton II, was expressly based on its interpretation of the defendants' actions as much broader than the simple drafting and approval of a search warrant. Hence, even if the Court in Forsyth did find that absolute immunity attached to authorization of a warrantless wiretap, and even if that were the same as drafting and approving a warrant, Forsyth would not contradict the Seventh Circuit's decision. Forsyth, however, held no such thing. The Court simply remanded the matter to the District Court for additional fact-finding, in order to determine whether in fact the Attorney General acted in an investigative/administrative role, or an advocacy role, in approving the tap; and

*The federal Grand Jury Report, issued that same month, urged that "the state's attorney's office should discontinue or minimize the use of police assigned to it for normal police functions..." (FGJ Rpt., p. 116-17)

the case thus cannot be said to conflict in any way with the Seventh Circuit's holding, and in fact cites Hampton I with approval. Additionally, it is by no means clear that even the mere drafting and approving of a search warrant is protected by the narrow holding in Imbler, since that is so clearly an investigative activity. In any event, where the claim and the evidence are that the warrant was knowingly drafted, approved, and obtained on a perjured affidavit, the case would be controlled by the express exception in Imbler, of an almost identical factual situation in a case where the plaintiff alleged that prosecutors conspired with the police to fraudulently obtain a warrant. Guerro v. Mulhearn 498 F.2d 1252, at 256 (1st Cir. 1974), as cited in Imbler, at 430, fn. 31.

In essence, as shown by the plaintiffs' proof, the defendant prosecutors here were acting as police, and in conspiracy with police. The drafting of the warrant was but one aspect of the planning of the raid--a necessary pretext and instrumentality. The evidence showed that these defendants directed, assisted, and approved not only the search warrant but the raid itself, a raid which was planned with unconstitutional motive and intent, rather than for legitimate law enforcement purposes, and whose results were not only the seizure of evidence but also unconstitutional death, injury and arrest.

In Imbler, this Court expressly excepted Hampton I. Imbler v. Pachtman, supra, at 430, fn. 31. As Justice White noted in his concurrence, a prosecutor is not absolutely immune for initiating an unconstitutional arrest, again citing Hampton I as an important example. Imbler, at 441 (fn. 6) Other Circuits have found that similar, less egregious acts by prosecutors are similarly not covered by absolute immunity, and many of these cases were likewise expressly left standing by the Court in Imbler.*

*E.g., Guerro v. Mulhearn, supra; Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (Justice Department prosecutors not absolutely immune from suit for directing arrests of demonstrators. See also Baustrieri v. Warren, 314 F. Supp. 324 (W.D. Wisc. 1970) (Prosecutors who entered bar, carded people, checked liquor supplies, and closed the bar down not immune); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Lewis v. Brautigan, 227 F.2d 124 (5th Cir. 1955). See also, Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. (1977).

The plaintiffs, after discovery and presentation of their proof at trial, have now established an even stronger case to defeat immunity than was first examined by the Circuit Court in Hampton I, and reviewed by this Court, both on the subsequent petition for certiorari, and in Imbler itself. The plaintiffs have now presented a prima facie case that the defendants planned, approved and directed a police raid, with police officers personally selected and assigned to their command, that as part of that planning they obtained a search warrant based on perjured testimony, and that the raid which they planned and approved resulted in unconstitutional, politically and racially motivated killings and injury, arrests, and seizure of evidence.* Further, these defendants publicly applauded and ratified the result of the raid, while attempting to cover up its true character.

It is hard to imagine a factual setting less appropriate for the application of immunity. To so hold would unreasonably and illogically extend Imbler, and effectively eradicate §1983 actions against prosecutors, no matter how unrelated their actions are to legitimate advocacy functions, or how heinous the result of their actions. Clearly, this Court should deny certiorari on this issue.

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*As the Circuit Court put it:

> These defendants (Jalovec, Hanrahan, the federal defendants and the raiders) also engaged in an extensive series of communications which could demonstrate to a reasonable person the existence of an agreement--either tacit or express to achieve their shared objective--inflicting injury to the BPP." Hampton II, at 624

B. THE CIRCUIT COURT CORRECTLY HELD THAT THE PLAINTIFFS PROVED A PRIMA FACIE CASE OF VIOLATION OF THEIR CONSTITUTIONAL RIGHTS BY THE DEFENDANTS' POST-RAID PUBLICITY CAMPAIGN; AND FURTHER THAT THIS CAMPAIGN WAS NOT PART OF A PROSECUTOR'S ADVOCACY FUNCTION.

in Point X
The state defendants argue that "Public Officials Have a First Amendment Right to Respond to Accusations of Misconduct,"* and that defendants Hanrahan, Jalovec, and the raiders should thus be immune from suit for the publicity barrage they carried on after the raid, under the rule of Paul v. Davis, 424 U.S. 693 (1976), and Barr v. Matteo, 360 U.S. 564 (1959). They claim that the Circuit Court makes the T.V. reenactment and the Tribune exclusive "in themselves actionable;" but the Court of Appeals correctly found that Barr and Paul do not apply, because the defendants' "publicity campaign" did not simply defame the plaintiffs, as was the case in Barr and Paul, but violated "specific statutory and constitutional rights," both as part of the conspiracy, and individually under 1983. Hampton, at 632, 627-28. Among these rights were plaintiffs' First Amendment right of political thought and expression, which the evidence showed was powerfully chilled by the defendants' conspiratorial actions; their right to be free from harassment and public attack because of their political affiliation, especially where false claims are used in the attack, as guaranteed by the First and Fourteenth Amendments; their right to seek redress, including the pursuit of this litigation; and the right to be free from false arrest and malicious prosecution, as protected by the Fifth and Fourteenth Amendments. Therefore here, as the Circuit Court correctly held, the plaintiffs established a prima facie case that the defendants' publicity campaign directly caused several egregious violations of the plaintiff-survivors' constitutional rights, and the defendants' liability must then be determined by a jury under the standards of qualified immunity reaffirmed by this Court in Butz.

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*Defendants assert the issue for this Court is:

> "Whether a prosecutor, or a policeman who served a warrant, may be held liable under 42 U.S.C. §1983, et seq., for public statements made after arrest, concerning the service of a seach warrant, use of weapons, resistance, description of the physical evidence seized, and substance of the charges, in response to prior instant public accusations of murder made against them, without evidence that those statements were an imminent threat to, or reasonably likely to interfere with, or did prejudice a fair trial of those arrested?--Especially where no trial of the charges was ever had?"

The defendants also argue that they had a First Amendment Right, especially as to Hanrahan, to act as they did, because they were public officials, trying to answer unfounded charges of murder, and to stem post-raid "violence in the community." No one has a First Amendment Right to violate the constitutional rights of others, no matter what they are allegedly responding to. There was no post-raid violence in the community, in point of fact, except for another pre-dawn police raid the next morning, at the home of Panther leader Bobby Rush. Further, the evidence showed that Hanrahan rather than the Panthers started the media blitz, and the fact that Hanrahan and Jalovec ordered the seized weapons be brought to the State's Attorney's office for show, rather than the Crime Lab for proper testing tends to show it was planned in advance. Finally, Hanrahan's publicity-seeking far exceeded the limitations placed upon a prosecutor by the Canons of Ethics, and was carried on with full knowledge of its extremely prejudicial effect upon the criminal cases of the survivors, and in fact served to inflame, rather than to calm public sentiment. This argument by the defendants turns the constitution completely on its head.

Hanrahan and Jalovec also complain that the Court of Appeals erred when it held that they were not entitled to absolute prosecutorial immunity for the publicity blitz. They argue that the Court's holding is in conflict with this Court's opinion in Imbler v. Pachtman, 424 U.S. 409 (1976), and with the decisions of the Courts of Appeals in Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1968); Ledwith v. Douglas, 568 F.2d 117 (8th Cir. 1978); and Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975). (St. Pet, at page 75.) Here they ignore the distinction recognized in pre-Imbler and post-Imbler cases, as well as Imbler itself, between advocacy and investigation/administration. The Court of Appeals closely analyzed the defendants' post-raid conduct in light of Imbler and Butz and held that some of their actions fell within the ambit of Imbler's protection and some did not. Thus, the decision to file charges against the survivors of the raid, the presentation of evidence before the state grand jury, and the "deal" with Assistant Attorney General Jerris Leonard, were actions found to comprise part of the quasi-judicial duties of a state prosecutor, and were held to be immune. 600 F.2d, at 632.

Other post-raid actions were found not to warrant absolute immunity. The Court found that the defendant prosecutors' generation of post-raid publicity was not intimately associated with the judicial phase of the prosecutorial function and thus not entitled to absolute immunity. 600 F.2d, at 632, 633. The Circuit cases cited by the defendants do nothing to further their argument. In each cited case, the actions of the prosecutor complained of were intimately associated with the judicial phase of the prosecutor's function. See, Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1978) (complaint for deprivation of right to speedy trial); Ledwith v. Douglas, 568 F.2d 117 (8th Cir. 1978) (initiating deceptive practices action and serving the complaint); and Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975) (decision on whether to continue criminal prosecution after retraction of key witnesses' testimony). Simply because the Court of Appeals held that the defendants were not entitled to absolute immunity for all their post-raid actions does not place its opinion in conflict with these cases. In fact, the decision of the Court of Appeals here is fully consistent with the cases cited by the defendants, since each applies a functional anaylsis to the actions of the prosecutor involved. Further, the Court of Appeals' opinion is consistent with those cases which have held that absolute immunity does not exist for actions taken by prosecutors which are not intimately associated with the judicial phase or are not undertaken in the prosecutor's role as a legal advocate for the State--such as publicity which occasions unconstitutional harm. See, e.g., Butz v. Economu, supra, Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied 437 U.S. 904 (1978); c.f., Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979).

The opinion of the Court of Appeals represents a proper application of existing law, and no reason exists for this Court to review its decision on the question of these defendants' post-raid immunity. The petition for certiorari should be denied.

C. THE DECISION OF THE CIRCUIT COURT DOES NOT CONFLICT WITH MONELL V. DEPARTMENT OF SOCIAL SERVICES OR WITH THE DECISIONS OF OTHER CIRCUITS BECAUSE IT IS BASED ON EVIDENCE OF DIRECT SUPERVISORY PARTICIPATION BY DEFENDANTS HANRAHAN AND JALOVEC, RATHER THAN ON ANY THEORY OF VICARIOUS LIABILITY.

The state defendants claim that "The decision of the court below conflicts with this Court's decision and that of the Fifth and Tenth Circuits on the issue of liability of a supervisor for the alleged constitutional torts of a subordinate under 42 U.S.C. §1983, et seq.," (Point V)* They claim that the Seventh Circuit's holding, that the plaintiffs made out a prima facie case against defendants Hanrahan and Jalovec under 42 U.S.C. 1983, conflicts with this Court's decision in Monell v. Department of Social Services, 436 U.S. 568 (1978), and several circuit cases, because it is purportedly based solely on a theory of "vicarious liability." Nothing could be further from the truth. The Circuit Court held, based on the evidence, that the plaintiffs had established a sufficient case that these defendants had failed to properly supervise the raiders, based upon the evidence of their actual supervisory activities, as described above in Point A, with respect to the preparations for the raid; and also including their instructions concerning evidence-gathering, given to the officers at the apartment by telephone directly after the raid, which led to the destruction and spoilation of evidence. These facts, as the Court found, established sufficient personal notice and personal and direct supervisory participation for a jury to determine these defendants' personal liability, based on whether the raiders' actions were reasonably foreseeable. Hampton II, at 627. See also Sims v. Adams, 537 F.2d 829, 831 (1976).

These defendants' liability under §1983 is further strengthened by their direct personal participation in planning the raid and drafting and approving the search warrant, evidence which standing alone establishes a §1983 claim against the defendants. In fact, in the very case upon which the defendants purport to rely, the Court held that when a supervisory sheriff participated in obtaining warrants and planning a raid in which to serve them, but did not personally participate in the unconstitutional raid itself, it is for the

*Defendants say the issue is "whether liability exists under 42 U.S.C. §1983, et seq., without evidence of actual knowledge of the alleged wrongful conduct of subordinates? May a person be held liable for the alleged constitutional torts of another only because he is the supervisor of the latter?"

fact finder to determine whether the sheriff violated 42 U.S.C. §1983. Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) (en banc).

The Court's decision that these defendants must go to the jury on their §1983 liability is therefore grounded not in theories of vicarious liability, but rather on hard evidence of notice, and active participation in the actual direction and supervision of these defendants on this raid. This holding is therefore in complete harmony with Monell and the decisions of the Fifth and Tenth Circuits, as well as prior decisions by the Seventh Circuit; and this argument therefore raises no question worthy of review by this Court.*

D. THE CIRCUIT COURT'S DECISION THAT CERTAIN POLICE DEFENDANTS SHOULD BE AFFORDED QUALIFIED IMMUNITY FOR THEIR PARTICIPATION IN AND FAILURE TO CORRECT A SHAM POLICE INVESTIGATION IS TOTALLY CONSISTENT WITH THIS COURT'S DECISION IN BUTZ V. ECONOMOU SINCE THEY WERE ACTING IN AN INVESTIGATIVE RATHER AND AN ADJUDICATIVE CAPACITY.

The defendants claim that "the decision below conflicts with this Court's decision affording absolute immunity for adjudicative functions." (Point I)** They claim that certain police officer defendants, assigned to the Internal Investigation Divison (IID) of the police department, are absolutely immune under this Court's decision in Butz v. Economou.

The Court below found that the plaintiffs had made out a prima facie case against certain of these police defendants--Meade and Mulchrone--as participants in the 42 U.S.C. 1983, 1985(2), and 1985(3) post-raid conspiracy

*The defendants, in footnote * on page 61, imply that the Court erroneously sanctioned a negligence theory of recovery here, and that Procunier v. Naverette, 434 U.S. 555 (1978) precludes this. The Court disposed of this argument in its opinion stating:

> Defendants urge that plaintiffs be denied relief on the ground that negligent conduct is not cognizable under section 1983. We are not persuaded by this argument. Defendants are correct that "mere negligence" is not actionable under 42 U.S.C. §1983. Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976), cert. denied, 435 U.S. 932, 93 S.Ct. 1507, 55 L.Ed.2d 529 (1978). In Jamison v. McCurrie, 565 F.2d 483, 486 (7th Cir. 1977), Chief Judge Fairchild articulated the standard for a constitutional cause of action: "The plaintiff must show that (the police officers') misbehavior was either intentional or in reckless disregard of his constitutional rights," citing Bonner v. Coughlin, supra. The evidence offered by plaintiffs, however, viewed in the light most favorable to them, satisfies this test. Hampton II, at 625, fn. 25.

Further, Procunier expressly left open the question of whether mere negligence is actionable.

**Defendants say that the issue is "whether municipal officials have absolute immunity from liability under 42 U.S.C.§1983, et seq., for quasi-judicial acts performed during an internal police disciplinary hearing when acting within the scope of the exercise of statutory duties?"

to harass the survivors of the raid, to conceal the facts surrounding the raid," and "to continue an unfounded prosecution against the plaintiffs." Hampton II, at 627, 628, 629. Specifically, the Court found that these defendants' "actions reasonably could have been found to have encouraged the continuation of the unfounded prosecution by suppressing the development of inconsistent evidence against the raiders, Hanrahan and Jalovec." Id., at 629. As to defendants Ervanian and Kukowinski, the Court found irsufficient evidence of their active participation in the "whitewash," but found that evidence of their presence, acquiescence, and failure to take steps to correct or prevent the conspiracy, was sufficient to go to the jury under 42 U.S.C. 1986.* Id.,at 629.

The defendants here attempt to paint themselves as agency officials, similar to administrative law judges, and thereby seek to clothe themselves with the absolute immunity afforded to administrative officials by the rule in Butz. They claim that these defendants, charged with investigating misconduct of theirfellow officers, are acting in a judicial capacity. (S. Def. Pet., p. 53). A comparison of the Butz opinion to the case at bar shows that this argument is specious. In Butz, the Court found that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process to warrant immunity for the decision-makers. Butz, at 512-13. The factors relied upon by the Court include hearing officers' supposed insulation from political influence; the adversarial nature of the proceedings; the supposed impartiality of the decision-making process; and the officer's power to rule on evidence, issue subpoenas, and make findings of fact and conclusions of law. (Id.) Most importantly, the Court found that the Administrative Procedure Act assured independent judgment because it guarantees that the "hearing examiner is not responsible to or subject to the supervision or

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*Similarly, the Court found sufficient evidence to hold Assistant State's Attorneys Meltreger, Jalovec, and Sorosky under 42 U.S.C. 1986, characterizing their actions as "the deliberate preparation of perjured testimony," but found that these actions, by prosecutors, were immune under Imbler. Hampton II, at 633. Defendants imply that because the police defendants participated in these acts, as well as other aspects of the sham investigation, they too should be immune. To so hold, however, would cloak police with the same immunity as prosecutors whenever part of their investigative duties coincide with those of the prosecutor. Such an interpretation would completely defeat the holding of this Court in Pierson v. Ray, 386 U.S. 547 (1967), and be a totally unwarranted extension of the doctrine of prosecutorial immunity. See also, Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), cert. denied, Hilliard v. Clark, 423 U.S. 1066(1976); Hilliard v. Williams, 540 F.2d 220(6th Cir. 1976).

directing of employees or agents engaged in the performance of investigative or prosecutive functions for the agency." Butz, at 514.

Here the evidence showed that the IID defendants were police officers who suppressed evidence and conducted a sham investigation in a way to suppress conflicting evidence. There was no hearing, nor even any chargesbrought as a result of the investigation. These officers were in no way acting in a judicial or prosecutorial role. Defendant Captain Mulchrone, who personally supervised what the defendants themselves admitted was a "whitewash," was the head of both the IID and the Police Intelligence Division; in the latter role he participated in planning the proposed November 24th G.I.U. raid on Hampton's apartment--the raid which was called off after defendant Johnson's phone call.*

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*The IID was so notorious for its "rubber stamp" approval of all kinds of police violence in Chicago that, in 1973, after an extensive Chicago Tribune study on police violence and the IID was released, the Superintendent removed the investigation of brutality complaints from the police department and placed it under civilian control with civilian investigators. Their performance in this case was no doubt one of the main reasons for this change. As the Federal Grand Jury Report stated,

> The performance of this branch of the Chicago Police Department--the branch dedicated to impartial and objective investigations of police conduct--was so seriously deficient that it suggests purposeful malfeasance. The regular channels of the IID were bypassed. Instead of a complete investigation of any of the factual controversies raging in the press, the investigation consisted only of gathering all police reports, soliciting cooperation from counsel for persons accused of crimes (knowing that no defense counsel would permit pre-trial statements by an accused) and asking the officers involved a few simple conclusory questions in which they denied wrongdoing. No officer was given the opportunity to explain what happened in detail and all the subordinate officers were asked only to ratify their sergeant's account--which itself was based not only on prepared questions, but suggested answers composed by a police department lawyer and shown to the sergeant in advance.
>
> Nor did the IID investigate any potential violations of police department regulations by the Officers...
>
> Even the media accounts available to the IID clearly frame an issue as to whether the police department's own regulations were violated.
>
> Moreover, the publication of the results of this "investigation," in the view of the Grand Jury, was misleading to the general public by inferring that a legitimate investigation was held. The Grand Jury found a more detailed account of the raid in the Chicago Tribune than it did in the IID files.
>
> The Grand Jury recommends that immediate steps by taken to insulate the IID from any interference or pressure; that firm written procedures be established for the handling of investigations where officers are involved in shootings; that a directive prohibit the advance reading of questions and suggested answers to persons whose conduct is in question; and, that an alternative system of dealing with investigations of police conduct be explored. An organization charged with the responsibility of evaluating the conduct of police officers must have public credibility to succeed. The facts in this case show that the IID's performance does not deserve such confidence.

Federal Grand Jury Report, at 122,123.

(continued)

In this IID "proceeding ," there was no hearing, no testimony, no findings of fact, no record, and no appeal. Instead there were wholly contrived statements, and defendant Sadunas' false report, on the basis of which the defendants, three days later, with much fanfare, publicly exonerated the raiding defendants from any blame.*

The policy reasons for providing immunity to judges and prosecutors acting in their advocacy functions are wholly absent in the context of this IID "case." To apply Butz to afford these defendants absolute immunity would be a giant, totally unwarranted extension of the doctrine of judicial immunity and would overrule Pierson v. Ray. In point of fact, it would effectively abrogate a large portion of the Civil Rights Act. The petition for certiorari on this issue must therefore be denied.

E. THE CIRCUIT COURT'S DECISION DOES NOT CONFLICT WITH THE DECISION IN YASELLI V. GOFF OR THOSE OF OTHER CIRCUITS, BECAUSE THE DEFENDANTS' POST-RAID LIABILITY IS SUPPORTED BY MUCH EVIDENCE INDEPENDENT OF THEIR GRAND JURY TESTIMONY.

Defendants claim "the decision of the Court below conflicts with this Court's decision in Yaselli v. Goff and decisions of other circuits because the Court below allowed the use of prior testimony of a witness as substantive evidence of that witness's conspiring to violate or to deprive constitutional rights." (Defendants' Point IV)** They claim that because the raiders' Grand Jury testimony composed one element of proof of their involvement in the post-raid conspiracy, they should be immune from suit for all of their post-raid actions, under the rule set forth in Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1962) affirmed without opinion, 275 U.S. 503. In reality, the Circuit Court clearly set forth several additional bases, unrelated to their grand jury testimony, which both firmly placed these defendants in the post-raid conspiracy,

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(continued)
Concerning the general effectiveness of internal police disciplinary boards, see f5.3, Standards relating to the Urban Police Function, ABA Project on Standards for Criminal Justice, 1973, pp. 158-59.

*Illinois law, at that time provided simply that the Superintendent could suspend police officers for up to 30 days by whatever method he saw fit. Only if the suspension was for more than 30 days, was the officer entitled to a hearing before the Police Board, with certain due process guarantees, if the officer himself sought the hearing. Ill. Rev. Stat. 1969, Ch. 24, §810-1-18.1.

**Defendants state the issue as "whether testimony of a witness in a prior proceeding may be used to create liability for the witness under 42 U.S.C. §1983, 1985(3) or 1986?"

and established their individual liability under 42 U.S.C. 1983:

- Several survivors were jailed on the basis of the officers' sworn complaints that they committed attempted murder and aggravated battery against the raiders. Hampton II, at 630.
- On the morning of December 4th, the raiders, Hanrahan, Jalovec and Mitchell met and from their conversations emerged an allegedly distorted if not false account of the raid which justified the officers' actions. Id., at 627.
- In the days that followed they continued to circulate reports to justify the survivors' continued detention. Id., at 628.
- They participated in a promotional campaign including the Chicago Tribune Exclusive and CBS T.V. "reenactment", giving their false versions of the raid, while knowing that it would occasion prejudicial pre-trial publicity to the plaintiffs. Id., at 616-17. 628.
- They participated in the IID "Whitewash" investigation, which was designed to suppress inconsistent evidence; Id., at 628, 629.
- They spoliated evidence at the scene on December 4th; Id., at 616.

It was on this evidence, as well as evidence that the plaintiffs' subsequent indictments were based in part on the raiders' testimony, that the Court found that the plaintiffs had made out a prima facie case that these defendants "instituted an unfounded prosecution, and supported its continuation," Id., at 620, (refering to §1983 individual liability claims), and further, that "a jury reasonably could infer that a conspiracy existed to conceal the facts of the raid and continue an unfounded prosecution against the plaintiffs," (referring to 42 U.S.C. 1985(2) and (3) claims) Id., at 628. Therefore, even if one assumes, as the defendants claim, that defendants' Grand Jury testimony cannot be used to establish their liability, the Court relied on much additional evidence which established their involvement in the post-raid conspiracy, established numerous overt acts in furtherance thereof, and additionally and alternatively established a prima facie case of non-conspiratorial liability under §1983.

Further, the principle of absolute immunity for a witness was no more than dictum in the 2nd Circuit's decision in Yaselli, since the only issue actually before the Court was that of prosecutorial immunity.

Approval of the Yaselli dictum in passing by the Court in Butz can hardly be said to have elevated it to the status of a holding by this Court. The defendants have cited several Circuit Court cases which have held that witnesses are immune from suit for their testimony; however, in each instance, the cases concerned trial testimony, where protection against prejudice and inflammatory statements by a witness, which lie in cross-examination and evidentiary rulings by the trial Judge, are obviously much greater than at a Grand Jury. See, e.g., Brewer v. Horowitz, 535 F.2d 830, at 837, (3rd Cir. 1976). At a grand jury proceeding, there are no such protections against malicious prosecution.

In the one reported case involving testimony was before a grand jury, rather than at trial, the Court found that the witness, a federal prosecutor, was not immune from suit. Briggs v. Goodwin, supra. In Briggs the Court also distinguished between immunity for civilian witnesses and those who are government or state officials, pointing out that the policy behind common law immunity--designed primarily for private citizens--was not present where the claim was constitutional and the witness a government agent. Briggs, supra, at 27-8; see also Burke v. Miller, 580 F.2d 108 (4th Cir. 1978) (Winter J. concurring at 111-112.) Similarly, the Sixth circuit has held that a police officer who suppressed evidence and gave misleading testimony at trial is liable under 42 U.S.C. 1983, and 1985; Hillard v. Williams, 516 F.2d 1344 (6th Cir. 1975) cert. denied as to police officer Clark, Hilliard v. Clark, 423 U.S. 1066 (1976), Hilliard v. Williams, 540 F.2d 220 (6th Cir. 1976). The most crucial distinction between the cases relied upon by the defendants and the instant case, is that the entire basis of asserted liability in the other cases was found in the defendants' witness testimony; and that is certainly not the situation here.

The defendants also claim that the Court below erred by allowing the grand jury testimony to be used as substantive evidence to prove the conspiracy. This is a further large step, even from the dictum in Yaselli, and one which is not justified by the rationale behind immunity, or existing case law. Harris v. Harvey, 605 F.2d, at 335. Again, however, even if thistestimony could not be considered, there is independent evidence to establish liability, as set forth above.

This issue is therefore not worthy of this Court's review, since there is no real conflict with Yaselli v. Goff or the decisions of other Circuit Courts of Appeals. The decision of the Court of Appeals is firmly based on the evidence in the record, the vast majority of which had no relationship to grand jury proceedings.

F. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS HAD PROFFERED SUFFICIENT EVIDENCE OF THE DEFENDANTS' BAD FAITH TO REQUIRE A JURY DETERMINATION, AND DID NOT IMPROPERLY PLACE THE BURDEN OF PROVING GOOD FAITH ON THE DEFENDANTS.

The defendants claim that "the Court below is in conflict with other circuits in placing the burden of proving good faith on defendants." (State Defendants' Petition, Point VIII)* They argue that plaintiffs did not introduce evidence of the defendants' bad faith and that, given that premise, the Court of Appeals' decision, contrary to decisions in the First and Fifth Circuits established a rule that the defendant must prove his good faith. They cite Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979), and Kosta v. Hogo, 560 F.2d 37 (1st Cir. 1977). Defendants place much reliance on the fact that the plaintiffs did not call many of the defendants to the stand, and that "plaintiffs did not identify any of these defendants, nor testif(y) how any one of them caused any damage." (St. Pet. at 67) This argument demonstrates a deliberately misleading interpretation of both the Rules of Evidence and basic concepts of adequate proof. Prior admissions of defendants, by deposition, other testimony, and in documents, are admissible along with statements by co-conspirators under the Federal Rules; and plaintiffs convincingly proved a prima facie case against the non-testifying defendants by the use of this evidence. For example, admissions placed the non-shooting defendants in the pre-raid planning meetings, and in the apartment when some defendants beat and racially abused the plaintiffs while others "callously chose to watch", and while evidence was spoliated at the scene; admissions established the IID defendants and the non-shooters'

*Defendants say the issue is "whether a defendant in an action under 42 U.S.C. §1983, et seq., has the burden of showing good faith, or does Plaintiff have the burden of showing defendants' bad faith? Is the "good faith" of a defendant which was shown during Plaintiffs' case sufficient to direct a verdict in favor of the Defendant, or is the question of "good faith" always a jury question?"

roles in the IID "whitewash", false arrests, malicious prosecutions, and coverup of evidence. Prior admissions established that defendant Sadunas, the firearms examiner, falsely matched two shot shells fired from a police gun with that of Brenda Harris, in order to conform with the police story that Harris fired first; and this report was used by the co-conspirators in the IID investigation to get indictments before the Cook County Grand Jury, and to publicly support and justify the raiders' false version of the event. This evidence further showed that when Sadunas issued his false report, he had not tested the raiders' weapons, and that he made no effort to do so until after the FBI expert, Zimmers, discovered his mis-identification and called it to his attention some three months after the raid. Zimmers also testified that there were "no similarities whatsoever" between the shotshells in question and Harris' gun, and that, in 35 years of experience as a firearms examiner, he had never seen such a gross and obvious error by someone of Sadunas' expertise. (Tr. 20384) The Court below correctly held that the jury should determine, on this evidence, "whether his misidentification was the result of professional incompetence or conspiratorial conduct." Hampton II, supra, at 629*--in other words, whether he acted in good faith.

Likewise, the evidence presented by the plaintiffs against the defendants who did testify more than establishes a prima facie case of bad faith. The evidence against Hanrahan and Jalovec is summarized in Argument A, supra, and their testimony at trial did no more than put plaintiffs' evidence in issue. As to the "shooters," the Court found, as evidence of the defendants'

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* There is, however, evidence--and reasonable inferences--pointing to Sadunas' participation in the post-raid conspiracy. Sadunas' initial ballistics test was incomplete; he compared spent shotsells from the apartment only with the weapons seized at the apartment and ignored the weapons which had been used by the raiders. His examination resulted in a crucial misidentification which would have remained uncorrected absent Zimmers' subsequent tests and conclusions. When he learned of Zimmers' findings, Sadunas retested the shells comparing them with all the weapons--including those of the raiders. After these tests, Sadunas readily admitted his mistake. Given this set of events, we think that the determination whether his misidentification was the result of professional incompetence or conspiratorial conduct should have been left for the jury.

Hampton II, supra, at 629.

lack of good faith, that

> ...it reasonably could be inferred that Mark Clark's gun fired during his struggle with Groth rather than when the police officers first broke through the door. Additionally, plaintiffs testified at trial that none of the survivors fired a gun during the raid. And Zimmers' expert testimony corroborated these assertions. Numerous other questions of fact are present in the record, including the issue of whether Fred Hampton was drugged at the time of the raid and shot deliberately after Johnson, Truelock, and Bell had left the bedroom.

Hampton II, supra, at 625.

In fact, the evidence of their bad faith was so overwhelming that Chief Judge Fairchild, concurring, suggested it was possible that the plaintiffs' evidence would have "compelled a verdict for the plaintiffs unless rebutted." Hampton II, supra, at 648

As this Court has confirmed, the issue of good faith is one for the jury in all but the most unusual circumstances. Adickes v. Kress, 380 U.S. at 176 (Black concurring); Imbler v. Pachtman, supra, at 419 (n. 13). See also Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1978). The Court of Appeals after thoroughly examining plaintiffs' evidence in light of the standards set forth by the Court in Wood v. Strickland, 420 U.S. 308 (1975) and Scheuer v. Rhodes, 416 U.S. 232 (1974)* as well as in Adickes and Imbler, found that the plaintiffs had met their burden of proof on the issue of good faith and should have survived the motion for directed verdict. The Court below neither expressly or implicitly placed the burden of proving good faith initially on the defendants,** and the defendants can point to no statement in the opinion by which it does. This unfounded claim is totally unworthy of consideration by this Court.

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*See Hampton II, at 634-5. "Thus we hold that the question whether defendants reasonably believed their conduct did not violate a constitutional right, given the evidence presented at trial, should have been submitted to the jury" and "a determination of whether their (the defendants') actions satisfy the conditions for this defense (qualified immunity) must await the retrial." Hampton II, at 635 (emphasis added)

**The plaintiffs, however, do not wish to convey that they subscribed to the wisdom or correctness of placing this burden on the plaintiffs, as apparently held by the First and Fifth Circuits. We argue only that our case does not conflict with these cases on this issue. Further, even if it could be found that the Circuit Court somehow misapplied the burden to the defendants, there was sufficient evidence of bad faith presented so that the same result must be reached--as was the case in Cruz v. Beto.

G. THE CIRCUIT COURT CORRECTLY FOUND THAT THE PLAINTIFFS HAD TENDERED SUFFICIENT EVIDENCE OF THE STATE DEFENDANTS' ANIMUS, INDEPENDENT OF THE FBI'S COINTELPRO PROGRAM, TO NECESSITATE SUBMISSION TO THE JURY

The state defendants in Point VI claim that "the Court below failed to apply the requirement that to establish liability under 42 U.S.C. §1985(3), an invidiously discriminatory animus must be proved against each person sought to be held liable thereunder."* The defendants claim the Court's rule in Griffin v. Breckenridge, 403 U.S. 88 (1971), requires such proof,** and that because these defendants claim they did not know about COINTELPRO, and since plaintiffs' purported to prove animus by COINTELPRO alone, plaintiffs therefore did not meet this burden.

The Court of Appeals determined that the federal and state defendants shared a "racial or otherwise class based animus," as required by Griffin:

> Defendants also contend that plaintiffs have failed to state a claim under section 1985(3) because they have not proved that a racial or otherwise class-based, invidiously discriminatory animus was behind the conspirators' actions. Proof of a class-based animus underlying the conspiracy is, of course, a requirement of a section 1985(3) claim. Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Griffin itself held that race was such a class-based animus, but did not establish what other types of class-based animus were sufficient to state a claim. The conspiracy alleged in this case, however, does not require an intensive anayisis into either the meaning of Griffin or Congress' intent in drafting section 1985(3) to determine whether the class-based animus requirement was satisfied. The statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives. And this is precisely the sort of conspiracy alleged by plaintiffs in this case.

Hampton II, at 623*** (Footnotes omitted.)

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*The defendants say the issue is "whether a conspiracy may exist where there is no proof that Defendants know about the object of the conspiracy and where Plaintiffs admit that fact? Must invidiously discriminatory animus be proved against each alleged conspirator under 42 U.S.C. §1985(3)?

**In fact Griffin does not stand for the proposition for which the defendants claim it does, as it neither sets the terms for proving animus, nor does it require that animus be separately and affirmatively established for each co-conspirator; or even, for that matter, for each grouping of conspirators.

***Defendants argue that race alone could not possibly be the substance of the "animus" which must be shown under Sec. 1985(3), since five of the raiders were black themselves. (St. Pet, p. 63) Aside from the fact, plainly noted by the Court of Appeals, that the conspiracy alleged by plaintiffs was "impelled by a commingling of racial and political motives," (p. 623) it is simply a further exercise of racism to pretend that racial oppression does not result in some members of the subjugated group being turned against--and, like the legendary "black overseer," used against--their own people; and, in such

(Footnote continued on next page following.)

The Court then summarized the evidence upon which it rested its determination:

> A brief recital of some of the evidence presented by plaintiffs substantiates this conclusion. The BPP was a black organization with a distinct political ideology and a variety of politically oriented programs. FBI documents offered by plaintiffs demonstrate that certain FBI activities directed against the BPP transcended mere "law enforcement," and were designed to "neutralize" the BPP as a political voice on racial issues. Hanrahan testified that two of the principal goals of the unit his office assigned to investigate the BPP were to combat the anti-police propaganda the BPP had been disseminating in the black community and to mobilize support among blacks for police. And one of the purposes of the post-raid coverup was to prevent the development of widespread sympathy for the BPP cause which might have arisen out of a full disclosure of the facts surrounding the raid and the deaths of Clark and Hampton. Such purposes, if proven, bespeak of a class-based animus which is at the heart of section 1985(3)'s prohibitions. There is no doubt that the plaintiffs have satisfied this requirement for proving a section 1985(3) claim.

Hampton II, at 624

Additional evidence of this shared animus is found in actions and words of the raiding officers themselves--the extreme violence employed against these young, black members of the Black Panther Party during the raid, the racial and political epithets which accompanied the post-raid arrests and beatings by these defendants at the apartment, and the defendants' post-raid actions in continuing to harass and disrupt the plaintiffs as BPP members.*

The Court then further held that:

> "the plaintiffs presented considerable evidence including FBI documents and express statements by Hanrahan from which reasonable persons could conclude that these parties shared a 'class-based or otherwise discriminatory desire to undermine the BPP...and that a reasonable jury could find that the actions of these defendants demonstrate that they agreed at least tacitly to work together to eliminate the BPP."

Hampton II, at 624 (emphasis added)

***(Footnote continued from previous page.) "quislings" coming to conciously share the racial animus of their white masters against their own people. See generally, Frantz Fanon: The Wretched of the Earth; Black Skin, White Masks.

*The defendants claim that Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1978) precludes consideration of such evidence. This is not true, i.e., Askew only forbids establishement of a class (in Askew it was those whose apartments were raided by the defendants) on the sole basis of the event complained of. Here the defendants' words and actions during the raid and after is further evidence in support of the pre-existing animus of the defendants, which was independently shown. It is sheer nonense to contend that such evidence cannot be considered on the issue of animus.

And, after stating that "individual motives underlying the common illegal desire to achieve the conspiratorial objective need not be identical," the Court expressly rejected defendants' claims concerning the secrecy of COINTELPRO. The Court held that plaintiffs presented enough evidence that the federal and state defendants had a common purpose--inflicting injury to the BPP/and these plaintiffs by means of a common plan, the raid--to establish both the shared animus, and the common object of the conspiracy. Hampton II, at 624

Therefore, as the Circuit Court clearly recognized, the plaintiffs do not rely on FBI documents to show animus on the part of the state defendants, but find it in Hanrahan's pre- and post-raid statements and actions, and the other defendants' words and actions both at the apartment on the morning of December 4th and subsequently. Defendants' argument that their alleged ignorance of COINTELPRO acts as a bar to proof that they shared the racial or class-based animus of the federal defendants, and that all evidence to the contrary must be ignored, is sheer nonsense; and certiorari cannot reasonably be granted on this issue.

H. THE CIRCUIT COURT CORRECTLY HELD THAT PLAINTIFFS' CONSPIRACY CLAIMS UNDER 42 U.S.C. 1983 SHOULD GO TO THE JURY; ITS HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN ADICKES V. KRESS, AND DOES NOT CONFLICT WITH CHAPMAN V. HOUSTON WELFARE RIGHTS

Defendants claim that "the decision below, by sustaining a cause of action for conspiracy to violate 42 U.S.C. §1983, has created substantive rights contrary to the law as announced by this Court." (Point VII)*

They argue that Chapman v. Houston Welfare Rights, 60 L. Ed. 2d 508 (1979) and Adickes v. Kress, 398 U.S. 144 (1970), preclude plaintiffs' 42 U.S.C. 1983 conspiracy claim against them because the plaintiffs have not made a prima facie showing that each defendant deprived them of a right secured by the Constitution. This claim is absurd. First, the plaintiffs, as the Circuit

*Defendants state the issue as whether there is a cause of action for conspiracy to violate 42 U.S.C. 1983 since Chapman v. Houston Welfare Rights, __U.S.__, 60 L.Ed 2d 508, 522 (1979) holds that no substantive rights were created by 42 U.S.C. 1983.

Court correctly held, made out a sufficient case of Constitutional deprivation against each co-conspirator under 42 U.S.C. 1983 to go to the jury:

> Plaintiffs have presented evidence which could suggest that the defendants both as part of a conspiracy and individually--violated, among others, their clearly established First,[33] Fourth,[34] and Fourteenth Amendment rights.[35]
>
> [33] The suppression of plaintiffs' political speech through harassment, intimidation, and subversion--part of plaintiffs' case against the defendants--would constitute violation of a clearly established right.
>
> [34] An illegal entry based on a falsified warrant is a violation of clearly established Fourth Amendment Protections.
>
> [35] Killing and wounding the inhabitants of an apartment without cause, placing the survivors in jail, and subjecting them to trial based on spurious charges is a patently obvious violation of an individual's right not to be deprived of life, liberty, or property without due process of law.

Hampton II, supra, at 635 (emphasis added).

This holding, as supported by the record, disposes of the defendants' claim, even assuming the validity of its premise. Such a construction, however, does violence to this Court's decision in Adickes, and in fact is an argument that Chapman overrules Adickes, which would effectively vitiate just about all such conspiracy claims. In point of fact, Chapman simply holds that mere allegations that 42 U.S.C. 1983 was violated, without claimed violations of some underlying, substantive Constitutional right, are insufficient because U.S.C. 1983 simply provides a remedy, rather than creating an independent, actionable, statutory right. The decision makes no mention of 1983 conspiracies, and has no application to circumstances where there are numerous Constitutional deprivations.

In Adickes the Court held that the plaintiff would be "entitled to relief under 42 U.S.C. 1983" if she could prove that "a Kress employee... and a policeman somehow reached an understanding to deny Ms Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes." Adickes, supra, at 152. (Emphasis supplied.) The requirement then, is an understanding or agreement to deprive the plaintiff of her civil rights, which directly causes a Constitutional deprivation. This is a basic premise of the law of conspiracy and joint action, and satisfies the Adickes standard, that the plaintiff must prove the defendant deprived her/him of a right secured by the "Constitution and laws of the United States." Id. at 150. The defendant's contention that the plaintiff in a 1983 conspiracy must prove that each defendant individually violated a Constitutional right

is therefore completely refuted by the holding in Adickes, as well as elementary principles of conspiracy.*

Adickes, then, totally supports the Circuit Court's decision and in fact, it specifically relied on Adickes to support its holding that the plaintiffs made out sufficient 1983 conspiracy claims to go to the jury. Hampton II at 621. Chapman in no way undercuts the Court's holding because the plaintiffs here alleged and proved both individual and conspiratorial deprivations of underlying substantive constitutional rights, as well as a shared understanding and agreement which resulted in the onstitutional deprivations. As the Court below said:

> The defendants raise several questions about the legal sufficiency of plaintiffs' conspiracy claims which must be discussed. First, defendants contend that in order to have an adequate claim for relief under section 1983, a plaintiff must allege and prove both a conspiracy and an actual deprivation of rights; mere proof of a conspriacy is insufficient to establish a section 1983 claim. This statement of the law is correct, see Lesser v. Braniff Airways, Inc., 518 F2d538, 540 n.2(7th Cir. 1975), but we do not see how this affects the viability of plaintiffs' claims in the instant case. Plaintiffs' prima facie case offers a number of Constitutional deprivations to accompany their conspiracy allegations; clearly, the evidence would support a finding of injury which would constitute deprivation of Constitutional rights. Thus, this requirement of a section 1983 claim has been satisfied.
>
> Hampton, supra, at 622-3.**

*Additionally, the evidence that a policeman was in the cafeteria at the time the plaintiff was denied service, and subsequently arrested her, was found by this Court in Adickes to be sufficient proof of the conspiratorial understanding, and to require his involvement in the 42U.S.C.1983 conspiracy to be determined by a jury. Here the evidence of each defendant's shared understanding and involvement in both the raid and post-raid conspiracies to deprive the plaintiffs of their Constitutional rights was far more compelling than the evidence relied on in Adickes.

**The Court further held that liability for civil conspiracy requires proof of more than an agreement among conspirators; a plaintiff must show that an actual deprivation of her/his rights resulted from the conspiracy. See supra, p. 622. The raid and the injuries suffered by plaintiffs as a result of the raid be found to constitute this actual deprivation of rights. Thus plaintiffs have established a prima facie case sections 1983 and 1985(3) for civil liability: a conspiracy to violate their civil rights, and actual deprivation of those rights arising from the implementation of the conspiratorial plan. Hampton II, at 627.

The Court carefully followed the holding in Adickes which is in no way affected by the subsequent holding in Chapman. This claim by the defendants does not supply even a colorable basis for granting certiorari and the Petition on this issue must also be denied.*

*The Defendants' claim that the plaintiffs, by their 1983 conspiracy claim, are somehow trying to get around the requirement that animus be shown, in 42 U.S.C.1985. As the Court below recognized, the 1983 claim is supplemental to the 1985 claim, although premised on the same evidence. Plaintiffs are not attempting to "get around" the requirements of 1985; they have made out a strong case under that provision. Section 1983, however, permits them to recover for a conspiracy to deprive them of their constitutional rights, if proven, even if the jury determines that it was not done with either a "racial or class based animus."

I. THE COURT OF APPEALS CORRECTLY APPLIED THE BALANCING TEST OF ROVIARO v. U.S. IN RULING THAT DEFENDANT GROTH MUST DISCLOSE THE IDENTITY OF HIS ALLEGED INFORMANT; AND THE COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S RULE IN FRANKS v. DELAWARE ON THIS ISSUE.

Defendants argue that " the court below wrongfully ordered disclosure of the identity of a confidential informant and failed to follow this court's decision in Franks v. Delaware."* They seek this Court's review of the 7th Circuit's holding that defendant Groth must reveal his alleged informant on the false grounds that the lower Court's derision failed to follow Franks v. Delaware, 438 U.S. 154 (1978), Roviaro v. U.S., 358 U.S. 53 (1957), and two other Circuit Court decisions. Defendants completely ignore the evidence, relied upon by the Circuit Court below, that defendant Groth had no informant, and obtained the warrant, which was the pretext to the raid, by perjury. Further, they make the outlandish claim that "there is no dispute that defendant O'Neal was a reliable informant."*

The Court below correctly followed this Court's decision in Roviaro, as adapted to the circumstances of a civil case, applying the rule that, "where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way," Id. at 637. The Court correctly considered the competing interests to be balanced: "the free flow of information against the individual's right to prepare his defense [or the pursuit of his cause of action]" Id.; and the factors to be examined under the balancing test: "the relevance of the informant's information to possible defenses [establishment of a cause of action], the possible significance of the information, and the seriousness of the litigation." Id. at 637, 637 nt. 41.***

* Defendants say the issue is "whether a reviewing court may, in a civil case, for discovery purposes, compel disclosure of the identity of a second confidential informant on a search warrant, after identity of the first, an FBI paid undercover Black Panther, has been disclosed, where the warrant is valid based on the information from the disclosed informant alone (also corroborated by the search). Whether the reviewing court may compel disclosure without a trial court hearing?"

** A complete recitation of the facts on this issue, from plaintiffs' Brief in the Court of Appeals, is found at Appendix C.

*** The Court relied on Westinghouse Electric Corp. v. City of Burlington, 351 F. 2d 762 (D.C. Cir. 1965), in applying the rule in a civil case: The language employed by the Court in Roviaro encompasses civil litigation as well as criminal litigation, and the competing interests underlying the privilege and its exceptions are essentially the same in both contexts. (continued)

The Court proceeded to examine the "particular circumstances" of this case, in light of the Roviaro standards, finding that, although the "trial judge resisted plaintiffs' effort to make a record," Hampton II at 637, that a "considerable amount of evidence was introduced" which supported the conclusion that defendant Groth did not have an informant:

> First, Groth had no record of payments to his informant since, according to Groth, the informant's information was provided for advancement in other areas. Groth never elaborated what these incentives were. Further, the similarity of the content and the timing of the information received by Jalovec and Groth is striking: Each said that on December 2 his informant told him about the weapons, inhabitants and visitors to the apartment, the apartment's layout, and the BPP meeting on December 3. And while , as the state defendants correctly indicate, this could mean simply that the reports provided by two different sources were corroborated, the fact that each report was similarly incorrect about the number of sawed-off shotguns in the apartment casts doubts on this explanation. Groth's destruction of all the information he received from his informant , including the floorplan he allegedly constructed based on his informant's description of the apartment, also undermines Groth's claim that he had an independent source. More importantly, Jalovec asked Mitchell after the raid if he cared whether it was disclosed that he was "the source" for the information leading to the raid. And both Piper and Mitchell sent memoranda to the FBI in Washington which said that O'Neal was the only source for the pre-raid information. (Id. at 637-8, footnote omitted; emphasis supplied.)

Further evidence included Defendant Hanrahan's admission that the FBI supplied the information which was "the basis for the raid." (Tr. 28063), making a total of four of the six key raid planners who had at various times made admissions which strongly supported the plaintiffs' contention that Groth did not have his own informant.

The Court spelled out the importance of Groth's alleged informant to the plaintiffs' case:

> A determination that Groth's informant did not exist would have significant ramifications for plaintiff's case. The warrant used to gain entry to the apartment would be supported only by the misrepresented, triple hearsay Groth received from Jalovec, and Groth's own perjured statement. Perhaps more importantly, such a conclusion would bolster plaintiffs' conspiracy claims. It would be powerful evidence of Groth's bad faith vis-a-vis plaintiffs. And it would highlight the importance of the federal defendants in the alleged conspiracy. If O'Neal was the only eyewitness informant able to provide the crucial pre-raid information about the apartment, there could be no question that he and his conduit to the state defendants, Mitchell, were indispensable to the entire operation. (Id. at 638, emphasis added.)

(continued) The Court also cited Socialist Workers Party v. Attorney General, 565 F.2d 19 (2d Cir. 1977). See also Wirtz v. Rosenthal, 388 F. 2d 290 (9th Cir. 1967); Cashen v. Spann, 311 A2d 192 (1973); 334 A2d (1975); 364 A.2d 21 (1976); 376 A.2d 186 (1977).

The Court found, furthermore, that

> Even if Groth did have an informant, disclosure of his identity would be important to a resolution of the case since that informant might be a critical figure in the conspiracy alleged by plaintiffs. If O'Neal, who was being paid for his work by the federal defendants was also the informant Groth relied on in his affadavit, plaintiffs would have additional evidence of the federal involvement in the raid itself. Further, the person described by Groth as his informant--according to Groth a member of the BPP--could be a co-conspirator. Groth said that his informant asked when he was going to "move on the crib" and provided information about the weapons when told that the presence of weapons in the apartment would precipitate a raid. Also, as a member of the BPP, Groth's informant may have been in the apartment or at least with Hampton the night before the raid--an important fact given the testimonial and scientific evidence introduced by plaintiffs suggesting that Hampton had been drugged prior to the raid. (Id., at 638.)*

The Court, while "mindful of the public interest in 'protecting the free flow of information,'" also considered

> the need to maintain the integrity of and confidence in the criminal justice system. The assertion of informer's privilege by a law enforcement official defending against a civil suit for damages based on his own alleged official misconduct should be scrutinized closely. (Id., at 638.)

Restricting its holding to the unique and compelling facts of this highly significant case, the Court held that disclosure was required:

> This case, in which plaintiffs have alleged gross misconduct by federal and state law enforcement officials and have presented serious evidence to support these claims, is of paramount significance. There is a serious factual controversy focusing on the existence or identity of Groth's informant, and a resolution of this controversy is essential to a just adjudication of plaintiffs' claims. Thus we conclude that the public's interest in encouraging the flow of information to law enforcement officials cannot prevail in this case, and that Groth must disclose the identity of his informant. In order to minimize both the risks to this particular informant and any adverse effects on law enforcement generally, we suggest that the appropriate parties move at the retrial for a protective order to set the terms of this disclosure. (Id. at 638-9. Emphasis supplied.)

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*Not surprisingly, the defendants in no way address these facts in their Petition. Instead they rely on a statement in the dissent that the plaintiffs have allegedly said that they seek the identity of Groth's purported informant in order to "try and find" evidence of illegality. In fact the plaintiffs never said this, and the statement by Judge Pell reflects his failure to check the claims in these defendants' briefs. Judge Pell simply repeated this claim of the defendants, which was made at page 183 of their brief. In this claim they cite to page 155 of the plaintiffs' appellate brief. Examination of this page and the rest of the brief shows that no such statement or anything even remotely similar, was made by the plaintiffs.

In their spurious, if somewhat desperate claim that the Court below was wrong in ordering disclosure of the identity of Groth's alleged informant, defendants ignore the factual record and the full basis for the Court's decision, and instead attempt to focus solely on the warrant itself.* They claim the lower Court's decision "ignored" this Court's decision in Franks v. Delaware, which established standards for determining when a Court should "go behind" a search warrant in order to determine its veracity. The decision there in no way alters or affects this Court's rule in Roviaro. Even if it did, and its standards were somehow grafted onto the Roviaro standards, the soundness of the Court's decision in the case at bar would be enhanced, not undermined. The same rationale, which compelled the Court to permit criminal defendants to challenge the facial validity of a warrant, is singularly and powerfully present here:

> ...probable cause, supported by an oath or affirmation, would be reduced to a nullity if a police officer was able to deliberately falsify allegations to demonstrate probable cause, and having misled the Magistrate, then was able to remain confident that the ploy was worthwhile. (Id. at 168)**

In attempting to make a colorable claim under Franks, the defendants first make the patently false assertion that there is "no dispute as to defendant O'Neal's reliability." They go on to reason that, if both O'Neal and his information are reliable, the warrant could stand without Groth's perjurious claims regarding his alleged informant. Given this premise, they then claim that, since Franks would prevent a piercing of the warrant, it also prevents revelation of the informant.

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*The application for search warrant, which Groth submitted under oath, reads:

> A reliable informant, who has furnished reliable information to affiant on several past occasions which has led to the confiscation of 2 sawed-off shotguns in two separate raids, and has provided information that has led to several convictions, informed the affiant DANIEL GROTH that on December 1, 1969, he had occasion to enter the above described premises at 2337 W. Monroe, 1st floor apartment. During this visit, he observed numerous weapons, including three sawed-off shotguns, whose barrels appeared to be approximately 12 inches in length. Along with these weapons he observed numerous rounds of ammunition. When he left the premises the above described sawed-off shotguns were still there. Independently of this above information, DANIEL GROTH was informed by ASA Richard S. Jalovec that on December 2, 1969, Jalovec had a conversation with a reliable informant who also stated that sawed-off shotguns and other weapons were being stored in the first floor apartment at 2337 W. Monroe, Chicago, Ill. This informant, according to Jalovec, has provided information in the past which has led to the arrest and indictment of numerous individuals. (St. Def. Ex. 119.)

** The Seventh Circuit has strongly reaffirmed the importance of this deterrence of police falsification and misconduct: "intentional false

(continued)

In the first place, on the evidence, the contention that O'Neal was a reliable informant is laughable. At the time of the raid he was classified as a "probationary informant" by the FBI, and his information had allegedly led to "several arrests," but no convictions [illegible]lly important, as the Court notes elsewhere, was evidence showing that O'Neal was a provocateur and COINTELPRO agent, whose main job was to "disrupt and neutralize" the Panthers by, inter alia, spreading false stories and lies about its members. In fact, the record showed that prior to December 4th he had repeatedly reported false and exaggerated stories to Defendant Mitchell, in order to receive larger payments since his stipends were based on the "value of his information."

Secondly, the defendants claim the information supplied by O'Neal was reliable, whereas, in fact, as the Court correctly notes, it was "misrepresented triple hearsay."** Hampton II, at 638. Both O'Neal's own deposition testimony and FBI documents introduced at trial showed that O'Neal had not supplied Mitchell with any information concerning illegal weapons at Hampton's apartment, and that the information that he had supplied concerning weapons was stale by several weeks. (Tr. 22240) (PL 22, 83)

The evidence adduced at trial concerning the FBI portion of the warrant therefore more than satisfies the Franks test, even if the perjury concerning Groth's own alleged informant is ignored. Further, the defendants' own testimony at trial makes a lie of their argument, since defendant Jalovec, the assistant state's attorney who drafted the affidavit with Groth, testified that on December 3rd, he knew the O'Neal/Mitchell information was of insufficient legal reliability by itself to support probable cause ; (Tr. 24534-40, 25278) and Groth concurred in this opinion.

(continued) "swearing (of a warrant)...is such an egregious threat to Fourth Amendment rights that it deserves the strongest deterrent possible." U.S. v. Jose L. Fernandez-Guzman, 577 F.2d 1093 (7th Cir. 1978).

* In Illinois during 1969 such allegations of reliability in the search warrant affidavit were not considered sufficient indicia of reliability under the first prong of the test prescribed in Aguilar v. Texas, 378 U.S. 108 (1963) and Spinelli v. U.S. 394 U.S. 410 (1965).

** In the FBI portion of the warrant, defendant Groth swore that he got information from Jalovec who got it from a "reliable informant." In fact, as these defendants admitted at trial, this "informant" was defendant Mitchell who, contrary to the assertions in the warrant, had never been to the apartment, but who was rather relying on information supposedly supplied by the totally unreliable O'Neal.

Defendants assert that hearsay and multiple hearsay may be a permissible basis for a warrant. (St. Pet. p. 54) This may be true in a case where the reliability of the original source of information is proven; it can have no application where the basis is "misrepresented triple hearsay," from an informant the affiant knows to be unreliable, and where the information itself is rife with misrepresentations and contradictions. The particulars here thus outstrip the multiple hearsay condemned by this Court in Aguilar v. Texas, 378 U.S. 108 (1963).* So even if the Franks test is applied, and the apparent perjury concerning Groth's own alleged informant is ignored, the O'Neal/Mitchell portion of the warrant reveals additional "material misrepresentations" which are false, and is woefully insufficient as an independent basis for a finding of probable cause.**

Further, even if we accept the defendants' premises, i.e., that the O'Neal/Mitchell portion independently supplies probable cause, and that it contains no knowingly false material assertions, this still affects only the issue of probable cause and the plaintiffs' Fourth Amendment claims. As stated above, there are other important reasons for revelation under Roviaro, including its relevance to strengthening plaintiffs' claims of conspiracy and bad faith, especially if it is shown from Groth's own mouth that he had no informant.

The Confederation of Police, which has submitted a brief as amicus curiae, relies on some statements printed in the Black Panther Party newspaper eleven years ago to claim that the BPP presents a public danger to society, and that, under Roviaro, this requires that Sgt. Groth's purported informant not

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* The case here can be sharply contrasted with the factual situation in U.S. v. Wilson, 479 F.2d 936 (7th Cir., 1973), cited by the defendants, for there the original "informant" was a computer, the data was given the credibility of business records by the Court, and the conduit was an undeniably disinterested private citizen. In this case, the source was quite unreliable, as demonstrated above, and the information was transmitted by two co-conspirators. In Wilson, the information led to the search of an automobile; here it was made the basis for a warrant used to effect a police raid in the dead of night, in which concentrated automatic weapons fire was directed at a place where raiders had been told an outspoken political opponent of the government would be lying asleep.

** The defendants also say that "the warrant has never been held invalid." It has never been held valid either, since defendant Hanrahan dismissed the charges against the survivors before their motions to suppress--or their motion for revelation of Groth's alleged informant--were heard in the criminal proceedings.

be revealed. While plaintiffs submitted much evidence of the positive programs and political activities of the BPP, it serves no purpose to go into them here.* Amicus lives in the past; whatever the "danger" may have been eleven years ago, it no longer threatens law enforcement, or "national security." The BPP has long since disbanded in Chicago, and has been largely involved in electoral politics in California, including the successful campaign of Oakland's Mayor Wilson. Former members of the Illinois Chapter include a former assistant state's attorney, a city employee, a congressional aide, a law school dean and law students, an aldermanic candidate, secretaries, health workers and a minister.

It is therefore ludicrous for Amicus to claim that either these plaintiffs or the remnants of the Black Panther Party present a "public danger." It is these defendants,who killed and seriously injured plaintiffs ten years ago and are still on the streets of Chicago armed with "color of law," who present a current "public danger," not the mothers of Fred Hampton and Mark Clark or those survivors who permanently carry the scars from machine gun bullets which tore them apart on the morning of December 4th. The Court of Appeals' decision does not jeopardize relationships between the police and their informants. It is restricted to the unique and compelling facts of this case, where, as the Court noted, the plaintiffs have presented "serious evidence" of "gross" police misconduct. Amicus would do well to heed the teachings of the Court below, instead of joining the defendants' unremitting ten-year effort to cover up and avoid the consequences of their own unconstitutional conduct.

Defendants claim alternatively that the Court below should have remanded for an evidentiary hearing on disclosure, although they put forward no reason which necessitates such a hearing. The Court dealt with this alternative:

> The trial judge never attempted to apply the Roviaro balancing test or to determine whether disclosure was essential to a fair determination of plaintiffs' cause of action.

*See Statement of Case, ante at pp. 5-8.

> The judge, in fact, resisted plaintiffs' efforts to develop a record on these issues. Ordinarily, we would remand the disclosure issue to the trial court for adjudication under the appropriate legal standards. In this case, however, enough evidence relevant to the validity of Groth's assertion of informer's privilege has been amassed throughout the trial to make such a remand unnecessary. Hampton, at 637.*

A hearing at this point would be quite superfluous; there has been a more than sufficient factual showing under Roviaro,and the Court has provided for an appropriate protective order. Additionally, the Court was well within its discretion to follow the course it did, and such an exercise of discretion hardly warrants review by this Court.

The Circuit Court, therefore, carefully followed the standards set forth by the Court in Roviaro , and, to the extent that Franks applies, the decision is likewise totally consistent. The defendants' claim on this issue is therefore entirely without merit, and must be denied.

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* The defendants also claim that the trial Court did apply Roviaro, citing pretrial arguments. (St. Pet. p. 56.) Roviaro was briefed and argued before the District Court, but it does not follow that simply because the case was cited to the Court that he followed its holding. As the majority points out, he did not. They further argue that the Circuit Court denied the plaintiffs' mandamus on the informant issue in early 1975, but they fail to note that no record had been yet developed in support of the claim that this informant did not exist, and that the standard for review was more rigorous.

J. THE PROCEDURES EMPLOYED BY THE COURT OF APPEALS IN DISPOSING OF THE STATE DEFENDANTS' APPLICATION FOR REHEARING EN BANC WERE FAIR, IN ACCORD WITH STATUTE, AND WITHIN ITS DISCRETION; AND THAT COURT'S ACTION PRESENTS NO ISSUE REQUIRING THIS COURT'S ATTENTION.

The state defendants argue that "the en banc procedure of the Court below conflicts with the norms set by this Court and the intention of Congress."* They urge that Circuit Judges Bauer and Wood, despite the fact that both had recused themselves from participation in the case, should still have taken part in the vote on whether it should have been reheard en banc; or, in the alternative, that the Court's bench should have been replenished for this purpose by judges from elsewhere. (St. Pet. p. 69-72)

This claim is groundless. Despite the two recusals, a statutory quorum of the Court voted on, and rejected, the defendants' petition for rehearing, and this is all that is required. Sections 46(c) and (d) of the Judicial Code state:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all the circuit judges who are in regular active service.
>
> (d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. --28 U.S.C 46, as amended Oct. 20, 1978, Pub.L. 95-486, Sec. 5(a), (b), 92 Stat. 1633.

The statute clearly defines a quorum; five judges are and were required in the Seventh Circuit. In this case, six qualified active judges voted on the petition. This Court has held that a senior judge of the same circuit, who was active at the time of an orginal decision, was not eligible to vote on whether to rehear a case en banc because his participation would "frustrate

*The state defendants say the issue is, "(o)n a vote to rehear en banc, whether a judge may recuse; and if so, must he be replaced and the litigants afforded both notice in advance of the vote, of such en banc recusal, and of the replacement and recusal procedure established by the circuit? On request for en banc rehearing, whether a litigant is entitled to consideration of his petition by a full circuit of active sitting judges?" (Point IX) To the extent, whatever it might be, that the defendants were entitled to prior notice concerning the recusals, they had it in Judge Pell's dissent, where he wrote that Judge Bauer and Judge Wood had taken themselves off the case. Hampton II at 661, fn.3. As to the procedures for rehearing, replacement and recusal, they are more than adequately set forth in many prior decisions of of the Court. See citations below, page 72 , fn. *; page 73 , fn.*

a basic purpose of the legislation not to confine the power of en banc decision to the permanent active membership of a Court of Appeals;" and because the statute did not expressly provide for it. U.S. v. American Foreign Steamship Corp., 363 U.S. 685, 689 (1960).*

The defendants' argument that Judges Bauer and Wood were required to vote on the question of whether to grant rehearing or not, despite their recusal, sounds ridiculous. How could a judge, who originally determined that he should disqualify himself,** subsequently decide that he could sit? Since the Seventh Circuit has often both voted on rehearing en banc, and

*Since this decision, Congress twice amended the statute, first in 1963 to specifically allow senior judges who sat on the panel to sit in the rehearing, but not vote; and again in 1978, to delete this allowance. See Moody v. Albemarle Paper Co., 417 U.S. 622 (1974). At no time has Congress made any provision to authorize judges to sit en banc in other circuits. The Seventh Circuit has consistently followed this principle. On the five occasions during the past three years where rehearing en banc was granted and the original panel included a judge from another circuit or the District Court, the judge sitting by designation was not permitted to vote on the rehearing petition, or to participate in the en banc rehearing. See U.S. v. Chapman, 575 F.2d 147 (7th Cir. 1978) and 7th Cir. order of 6/23/77 granting rehearing; Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977), #75-1908 and 7th Cir. order of 4/25/77 granting rehearing; First Wisconsin Mortgage v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978) and 7th Cir. order of 10/6/78 granting rehearing; Novo Terapeutisk v. Baxter, #78-1180, 7th Cir. order of 4/15/79 granting rehearing (pending decision); U.S. v. Johnson, 590 F.2d 250 (7th Cir. 1979) and order of 3/23/79 granting rehearing (pending decision). But perhaps the most compelling statement of the Seventh Circuit's observance of this principle is found in the Otto Kerner case; where all of the active judges recused themselves from consideration of the defendant's en banc suggestions. The petitions were therefore never acted upon, and effectively denied without order. U.S. v. Isaacs, 493 F.2d at 1124 (7th Cir. 1974) and order of 3/6/74; see also, Re Imperial "400", 481 F.2d 41 at 57 (3d Cir. 1973), cert. denied, 414 US. 880 (entire Court disqualified themselves, rehearing en banc denied); North Carolina Utilities v. F.C.C., 552 F.2d 1036 at 1045 (4th Cir. 1977) (no rehearing en banc because all but one judge disqualified himself). See also, U.S. v. Barnett, 346 F.2d 99 at 101 (5th Cir. 1965); I.B.M. v. U.S., 480 F.2d 293, cert. den., 416 U.S. 980 (2d Cir. 1972) (five voted, six sat).

**It appears that Judge Bauer's tenure as U.S. Attorney (1970-71), at a time when the F.B.I. was still concealing the truth about its role in this case, and his involvement in prosecuting Black Panthers during 1969, suggests his disqualification for the appearance of justice. Similarly, Judge Wood's appointments as Associate Deputy Attorney General from 1969-1972, and Assistant Attorney General, Civil Division, 1972-73, as well as his subsequent candidacy for Directorship of the FBI, would support his decision to recuse himself, in deference to the appearance of possible conflict.

sat en banc with a quorum less than the full court,* it would seem both unnecessary** and harmful to the appearance of justice for judges to originally recuse themselves, requalify themselves for a vote on rehearing, only to disqualify themselves again if rehearing is granted.

Finally, the defendants protest that "three judges determine the law of this circuit composed of nine positions" *** in this case. But all the non-disqualified judges of the Circuit reviewed the decision, and passed upon the petition to rehear, in fact six of the eight active judges considered their petitions.**** It is an affront to each qualified judge of the Seventh Circuit, and especially to the majority, to imply that they did not fairly consider the opinion, the briefs, and the petitions, and vote as

*Of the 11 rehearing en banc petitions granted in the past three years by the Seventh Circuit, the vote was taken, and the Court sat en banc, with a quorum of six or seven judges on at least three occasions. See U.S. v. Robinson,585 F.2d 274 (7th Cir., 1978) and 7th Cir. order of 3/20/78 (seven and six respectively); First Lincolnwood, 560 F.2d 258(7th Cir. 1978) and order of 4/10/78 (seven and seven respectively); Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978) and order of 4/10/78 (seven and seven); see also: I.B.M. v. U.S., 480 F.2d 293, cert denied, 416 U.S. 980 (2d Cir. 1972) (five of eight voted, six sat); U.S. v. Barnett, supra (seven of eight sat); Zahn v. International Paper , 469 F.2d 1033 (2d Cir. 1972) (seven of nine voted); Baltimore and Ohio R.R. v. Shenker, 303 F.2d 596 (3d Cir. 1961), aff'd. 374 U.S. 1 (1963) (six of eight judges voted).

**In Zahn v. International Paper, 469 F.2d 1033 (2d Cir. 1972), four of the seven voting judges voted to rehear the case, but since the full court consisted of nine judges, the petition for rehearing was denied. In Baltimore and Ohio R.R. v. Shenker, 303 F.2d 596 (3d Cir. 1961), aff'd, 374 U.S. 1, (1963), two of eight active judges recused themselves from the vote, and the petition for rehearing was denied, although four of the remaining six judges voted to rehear.

***Until October of 1978, the Seventh Circuit had eight active judges, pursuant to 28 U.S.C. 46. On October 20,1978, Congress amended the statute to provide for nine active judges in the Court. Following normal procedures Judge Cudahy was ultimately nominated, and on October 16,1979, after the rehearing petitions in this case were filed and denied, Judge Cudahy became the ninth active Judge on the Circuit.

****The state defendants incorrectly imply that it is highly unusual for three judges to speak for the entire court and that necessitates en banc rehearing. In fact, in the majority of cases, two Circuit Judges determine the law of the Circuit. In the past two and one-half years, over 10 per cent of the over 800 opinions issued by the Seventh Circuit have had a dissent. Further, 60 per cent of the decisions are rendered with at least one"visiting" judge. Therefore, in 60 to 70 per cent of the decisions of the court only two Seventh Circuit Judges have spoken for the Court.

the law and facts dictated.

This Court has stated that:

> En banc courts are the exception not the rule. They are convened only when extraordinary circumstances exist that call for the authoritative consideration and decision by those charged with the administration and development of the law in the circuit.
>
> U.S. v. American Foreign Steamship Comp., 363 U.S. 685,689 (1960)

In the case at bar, the Seventh Circuit followed its regular procedure in passing on the rehearing petition filed by the state defendants. These procedures did not conflict with any norm set by this Court nor with the intention of Congress. On the contrary, the procedure complied with the explicit language of 28 U.S.C. 46(c).

These defendants are not entitled to preferential treatment, either by the Seventh Circuit or this Court. It would be most improvident to grant certiorari to review the procedures set by a Court of Appeals regarding petitions for rehearing. In the absence of extraordinary circumstances, such procedures are left to the sound discretion of the individual Circuits. The defendants' petition for certiorari on this issue should therefore be denied.

K. THE FEDERAL DEFENDANTS, IN SEEKING REVIEW OF THE REVERSAL OF THE DIRECTED VERDICTS ON THE GROUNDS THAT THE COURT OF APPEALS' DECISION CONFLICTS WITH THE RULE OF BUTZ vs. ECONOMOU, PRESENT NO CLAIM OR ISSUE WORTHY OF CONSIDERATION BY THIS COURT.

The federal defendants argue that this Court should grant certiorari in order to consider whether the Court of Appeals misapplied the standard for qualified immunity set forth by this Court in Butz v. Economou.* Specifically, they rely upon the District Court's purported determination, supposedly made after "painstakingly reviewing the evidence," that "the federal defendants' denials that they knew of or participated in any plan to violate plaintiffs' Constitutional rights...were uncontradicted by any testimony whatever."**(Fed. Pet. 29,30) They claim that if their testimony were reduced to affidavits, they would be entitled to summary judgment under the rule of Butz.

In fact, it is the defendants,not the Court of Appeals, who misapply the rule of Butz; compounding the offense by borrowing from the District Court's outlandish "summary" and otherwise substantially misrepresenting the evidence adduced at trial.

The Court of Appeals correctly held that the principal issue on appeal was whether the trial judge erred in directing verdicts for the defendants. After "comparison of the extensive record...and the trial judge's Summary," the Court held that "there can be no doubt that the District judge erred by supporting his grant of the directed verdicts with evidence which was considered in the light most favorable to the defendants." Hampton II at 608. Further, as the Court of Appeals recognized, and as the record graphically reflects, the District Judge was extremely sympathetic to the federal defendants and their claims and resolutely determined to defeat the claims of the plaintiffs, regardless of the strength of the evidence. As the Circuit Court recognized, he "repeatedly exonerated" the federal defendants,

*The federal defendants say the issue is"whether the court of appeals' reversal of directed verdicts in favor of petitioners is inconsistent with the standard set forth in Butz v. Economou,438 U.S.478(1978), for terminating constitutional tort actions in which federal officers' sworn denials that they engaged in non-immunized conduct are not squarely contradicted by other evidence in the record."

**They also cite the District Court's statement that the defendants' denials were not contradicted by any other evidence offered by the plaintiffs; and that their actions were taken pursuant to "lawful FBI regulations and directives." (Fed.Pet. pp. 8-9)

despite their "willful disobedience of Court orders, obstruction of the judicial process, and other dilatory tactics;" and his restrictions on discovery and questionable evidentiary rulings "hampered the plaintiffs' ability to marshall evidence" and "thereby denied the plaintiffs the fair trial to which they were entitled." Id. at 608, ft.6;641.

The record also shows that in ex parte communications before and during the trial, the District Judge expressed belief that plaintiffs' allegations and proof against the FBI defendants were "impossible." Additionally, he is now subject to possible disciplinary proceedings by the Seventh Circuit for three ex parte letters which he wrote to federal counsel setting forth his views on the plaintiffs' sanctions motions against the federal defendants which were then pending before him, letters in which he actively intervened on behalf of the federal defendants and their attorneys, and absolved them of all blame for suppression of evidence. (Appendix H)

It is in this context of judicial error, bias and misconduct that the "findings" of the District Court, and thus the arguments of the federal defendants, must be viewed. In essense, these defendants argue that there is no evidence--only "speculation and conjecture"--which contradicts their bald denials of the ultimate facts, that they conspired or acted in concert with the state defendants in planning a raid with the intent and motive to illegally deprive the plaintiffs of their Constitutional rights. As the Circuit Court painstakingly demonstrated, nothing could be further from the truth.

In the main, the plaintiffs' proof against the federal defendants consists of FBI documents, which contain the "most damning evidence" of their liability. Hampton II at 608-9. This evidence was supplemented by deposition and trial testimony from the defendants and other FBI agents, which established the course of their conduct before the raid and helped to further show their state of mind, illegal motive and evil intent. Additional post-raid evidence strongly reaffirmed the nature of this conduct, revealing their secret ratification of the grossly unconstitutional results of the raid itself, and establishing a compelling case of cover-up and concealment of evidence by these defendants, which continued through the trial.

The evidence showed that the federal defendants supervised and implemented COINTELPRO against the Black Panther Party in Chicago during 1968-69. The primary purpose of this program was not to investigate crimes or gather intelligence about criminal activities,* but to disrupt, neutralize, cripple and in fact, destroy the Black Panther Party and what it stood for, and to prevent the rise of dynamic Black leadership from within its ranks. (Id. at 609. PL 1,2,6,105-7. Senate Select Committee, Final Report, Book 3,p.187.)/ [Appendix D]

William O'Neal was an FBI informant who joined the Chicago BPP within weeks of its inception in Chicago. He answered directly to Mitchell, and, at Mitchell's express direction, implemented COINTELPRO by encouraging the Panthers to "initiate and participate in various criminal activities, to obtain more weapons, and to increase their use of violence." Hampton II at 609. These actions were expressly lauded by his supervisors.(Id., Pl 19) These defendants also attempted to entice Chicago "street gang" leader Jeff Fort to take violent "retaliatory action" against Hampton and other Panther leadership under the COINTELPRO program. (Hampton II at 609,Pl. #11-13) Evidence presented at trial also showed that FBI cooperation with local police under the Counterintelligence Program was done not for legitimate law enforcement purposes, but rather to unconstitutionally disrupt the BPP and other political organizations. (Hampton II at 610, Pl. #16-18, 25,301)

During 1969, the Chicago police attacked the BPP Office on several occasions. Unlike the FBI raid of June 4,1969, which was accomplished with no shooting, these raids occasioned armed confrontations in which several BPP members were injured and arrested. The FBI defendants kept careful watch on these events. In mid-November, 1969, there was another shootout on the Southside of Chicago during which two police officers and one former Panther were killed; Hampton and the Party eulogized their former member. Hampton II at 610. That very night, Mitchell met with O'Neal, and showed

*Defendant Piper conceded at trial that during their entire "investigation" of the BPP, the FBI in Chicago did not detect them violating any federal laws, nor did they initiate any Federal prosecutions against them.

him gruesome pictures of the dead police officers. Within days, O'Neal returned to Mitchell with detailed information concerning Hampton's apartment. Together they drew a floor plan of the apartment, complete with a designation of the bed where Hampton slept. (Pl. #21,* Hampton II at 610) At this same meeting, O'Neal allegedly supplied Mitchell with information concerning weapons supposedly being kept at Hampton's apartment.** Although Mitchell claimed that word of a federally illegal sawed-off shotgun and a stolen police shotgun was included in this information, he made no mention of those weapons in a November 21st memo which he sent both to the Alcohol, Firearms and Tax Division (ATFD) and to Bureau Headquarters. Rather, he wrote that all of the weapons were "legally purchased." (P. #22) The federal defendants conceded that the ATFD would be the agency to notify and to carry out a raid if there were federally illegal guns present, yet ATFD was never notified. Hampton II at 611.

Instead, after conferring with defendants Johnson and Piper, Mitchell met with officers from the Gang Intelligence Unit of the Chicago Police Department (GIU) and supplied them with the floorplan, the weapons information, and information concerning when Hampton would be at the apartment. (Tr. 6844, 6888-9, Pl. 21) Hampton II at 611. By his own admission, he discussed a raid with these officers, and the GIU planned a raid for November 24,1969. This raid was later called off after a telephone call from defendant Johnson to the Commander of the Intelligence Division. (Tr. 5026,32) Hampton II at 611.

Mitchell then re-contacted defendant Richard Jalovec, who was in charge of Hanrahan's Special Prosecutions Unit, and during the next week, they had 5-7 conversations about Hampton's apartment. Hampton II at 611 ft. (12) These communications were unusual since Mitchell had communicated with Jalovec on only one other occasion since the past April,

**When questioned at his first deposition in January, 1974 , O'Neal denied that he had supplied Mitchell with any new information about at the apartment in November or December of 1969 and said further that Mitchell was not particularly interested in BPP weapons, despite knowing there had been several kept at the apartment. At trial, after it had become obvious that the "new weapons information" was crucial to Mitchell's defense, O'Neal changed his story.(Tr. 22240) Conversely, Mitchell told Piper that he had "great interest" in the apartment itself. (Tr. 9347)

*See Appendix G.

when he had informed Jalovec that O'Neal, who had been arrested with several other Panthers for conspiracy to kidnap, was his informant. On December 2, Mitchell met face to face with defendants Groth and Jalovec, gave them the floorplan, and discussed other information, including times when people would be present and absent from the apartment the following day. (Pl 21, 412, Tr. 7002) Hampton II at 611. Piper was aware of and approved these communications. All the federal defendants admitted that the only conceivable use of a floorplan was to aid in staging a raid.*(Pl 413) They also testified that, during this time, they had discussed the possibility of making a raid themselves. (Tr. 7017) On December 3, 1969, Johnson and Piper sent a memo to FBI headquarters advertising the impending raid as a Counterintelligence effort designed to disrupt the Panthers.** (Pl #25), Hampton II at 612,639.

O'Neal visited the apartment the evening of December 3rd, possibly staying as late as midnight, past the time when Hampton and others had a meal. Sometime on the 3rd he called Mitchell, evidently providing last-minute information on Hampton's probable movements that evening. (PL58; Tr. 15642-4) Before morning, unable to awaken despite the gunfire, and evidently heavily drugged, Hampton was shot to death in the bed located just where it was shown on the floorplan.

Within hours of the raid, Mitchell, after meeting with Johnson and Piper, went to Hanrahan's office, where he talked to Hanrahan, Jalovec and Groth, examined the seized weapons, discussed the raiders' story and talked to Jalovec about whether his connection to the raid should remain secret. Hampton II at 617 Mitchell subsequently buried the only copy of the floorplan in O'Neal's informant file, where only he, Piper and Johnson would have access. (Tr. 6927-9; 9291-2.) It was not until December 12, 1969, eight days after the raid, that Mitchell first mentioned in writing that O'Neal had informed him of the federally illegal shotguns. (PL 23) Hampton II at 617 And this memo, like the floorplan, was buried in O'Neal's file. (Tr. 7041) Hampton II at 617 Defendant Johnson was in charge of gathering evidence for the federal Grand Jury, and testified before it on Feb. 12, 1970. (Tr. 5334, 5197) Hampton II at 619. Johnson had participated in the pre-raid planning, and knew that defendants Mitchell, Piper and O'Neal were deeply involved in communications with Hanrahan's men concerning Hampton and the Panthers. Although he testified that he had been briefed for his appearance,* when asked by the Grand Jury to describe the FBI's role in the events, he failed to mention the floorplan, the allegedly federally illegal guns, or O'Neal's role as undercover agent; Hampton II at 619, and of course he never mentioned COINTELPRO. Neither Mitchell, Piper or O'Neal testified before the Grand Jury, and none of them came forward with any information concerning their role in the raid. Only a few days earlier, Bureau headquarters was informed by Chicago that Johnson's testimony would occasion"no fear of Bureau exposure." (PL 339) Further, Johnson was party to the highly secret deal between Jerris Leonard and Edward Hanrahan by which it was ensured that Hanrahan and his men would remain silent about the FBI's role. (PL 24)**

While the FBI defendants maintained their public coverup, they ratified and bragged about the results of the raid and their role in it, by internal memo. On December 11, 1969, Piper wrote the Bureau in Washington in Johnson's name, informing them that the floorplan and weapons information was "not available from any other source," that it "proved to be of tremendous value," and that the raid "was based on the information supplied by informant (O'Neal)." Piper and Johnson sought a bonus of $300 for O'Neal in the same memo, a request that the Bureau readily approved. At trial, Piper explained his actions by calling the raid--with two BPP members dead and four injured, as the memo states--a "success." (PL 83, Tr. 9529) On February 11, 1970, the very day Johnson

*The evidence also showed that the only other time that the defendants drew a floorplan was in June of 1969 when they used a floorplan of Panther headquarters obtained by O'Neal to aid them in an FBI raid of those premises. There was no evidence that they had ever conveyed a floorplan to state law enforcement officials or the County prosecutors office--on any other occasion than December 4, 1969.

**FBI documents revealed that the June FBI raid, led by defendant Johnson with the assistance of Mitchell and O'Neal, was also designed to disrupt the BPP under COINTELPRO. (Pl 20).

*Although Johnson testified at trial that he did not remember who briefed him, Piper recalled a conversation with Johnson just prior to his testimony during which they discussed his impending appearance. (Tr. 9135-44, 11419-20)

**The Court said on this subject that the "concerted effort to conceal facts is further evidenced by the obstruction of the Federal Grand Jury investigation..."Defendant Johnson's testimony could be found to be "false and misleading" with intent to "conceal the roles of Piper Mitchell and O'Neal in the raid," one which continued through the trial. Hampton II, at 628.

appeared before the Grand Jury, Mitchell wrote Bureau headquarters that O'Neal had "provided detailed floorplans of this apartment, identities of the occupants... (which) resulted in a quantity of weapons and ammunition being recovered and seven BPP members arrested." (PL #91, p6) Hampton II at 619.

During the pre-trial and trial of this case these defendants and their lawyers continued to cover up their role in the raid. They kept the O'Neal "bonus memo" secret throughtout the pre-trial on the false grounds that it and other related documents were irrelevant. They continued to conceal it during the first three months of the trial, despite a specific court order to produce all documents in O'Neal's files. Most of the documents which form plaintiffs' case against these defendants would still be secret if Mitchell had not inadvertantly revealed the withholding of files during his testimony. Hampton II at 639-41. The defendants' trial assistant, FBI agent Larry Deaton, later revealed that Piper himself had been in charge of reviewing the files and selecting documents for production in Court, and thus directly engineered the massive fraud --including concealment of his own bonus memo, which, perhaps more than any other, stands as the "smoking gun" with respect to the involvement of the FBI in this case. (Tr. 7225) Hampton II at 640. Mitchell likewise continued to hide the truth about the files after his blunder, by conducting a sham search for the missing document for another several days.* O'Neal personally attempted to intimidate two of plaintiffs' witnesses, former BPP members who were scheduled to testify about his illegal activities as a provocateur under COINTELPRO.

*Mitchell's blunder was to volunteer information in one of his answers which concerned an incident, highly derogatory to Hampton, which O'Neal had supposedly told him about, but which was not written about in any of the documents plaintiffs had received. Since he had testified that he wrote up everything O'Neal told him in memos, and that the memos were routed to O'Neal's file, the BPP file, and the files of each individual mentioned, a document reporting this incident should have been in both the O'Neal and Hampton files which had supposedly been produced. When the judge ordered him to check for the document, he began his search in the BPP file, at a point chronologically much later than the date of the alleged incident; and did not look in the Hampton or O'Neal files --since finding it there would have revealed that parts of those files had not been turned over. From day to day thereafter, for a week, he reported that he had not yet been able to locate the document; until, on the last day of his testimony, he finally brought it in. When it was detected that the document should have been included in the Hampton and O'Neal files, the whole deception unravelled, and the original files --perhaps fifty times as many documents as had previously been turned over, were brought into court. (Tr. 7040-4, 7085, 7525, etc.) Hampton II at 640.

It is in the teeth of all this evidence, much of it wilfully suppressed for many years, that the federal defendants tell this Court that their denials should be taken as a conclusive determination of the ultimate facts in the case. They claim they were only "exchang(ing) lawfully acquired information about actual or proposed criminal activities with local law enforcement agencies," and that they did not even know of, let alone help plan, the murderous raid. (Fed Pet p. 20) This was also their defense at trial, and it is wholly contradicted by their own documents, and their entire course of conduct, before and after the raid.

The evidence, as the Court of Appeals found, was more than sufficient to support the conclusion of a jury that these defendants worked with the state co-conspirators not for legitimate law enforcement purposes, but to "eliminate," as the Court of Appeals put it, the Black Panther Party. The Court correctly determined from the evidence that the "extensive series of communications" between the state and federal officers could lead the triers of fact to conclude that they had reached "an agreement --either tacit or express-- to act in concert to achieve this shared objective." Hampton II at 624. The Court further held that "plaintiffs' evidence indicates that the federal and state defendants shared in instigating and preparing for the raid," and that the communications between Jalovec and Mitchell, in particular, were essential to the planning and successful execution of the raid. Without the information the federal defendants furnished the state defendants, the state defendants could not have acted in furtherance of the purpose which plaintiffs contend the state and federal defendants shared --inflicting injury to the BPP." Ibid. It said the federal and state defendants, from the evidence, could be found to have performed "discreet functions in concert to further a common plan --the raid." Ibid.

When the evidence that Hampton was drugged, the obvious use of the weapons information as a pretext, the later ratification of the gross results of the raid, the unremitting attempts to cover up and suppress the evidence, the repeated departures from normal procedure, and the fraudulent character of the warrant itself are all added to the federal defendants' actions prior to the raid, their bald denials are put in resounding conflict, and demand determination by a jury.

It is therefore hard to imagine a case where the admonition that strict procedural controls must be used to limit unfounded Bivens claims, as articulated by Mr. Justice White in Butz, would have less applicability than here. The case is not only not frivolous, but "of paramount significance," in which plaintiffs have presented "serious evidence" of "gross federal and state misconduct," rebutted only by bald, self-serving denials from officers who have been substantially impeached. The issues going to the intent, motive and purpose of these defendants are singularly inappropriate for directed verdict, Adickes vs. Kress, since "(t)he existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." 398 U.S. at 176, Black, J., concurring. Given the strength of the conflicting evidence, and, in particular, the impeaching effect of these defendants' undeniable efforts to cover up, the need for the jury to weigh the credibility of the denials is absolute.

The federal defendants invoke this Court's rule in Butz, but, in reality, they are demanding absolute immunity, conditioned only by the requirement that they submit sworn denials of any wrongdoing. They couch their plea in the rhetoric of Law and Order, with dire warnings of the "chilling effect" if such denials are left subject to challenge, by way of a smokescreen to hide their deep implication in one of the most shocking examples of police violence in American history. As this Court has said, "It should hardly need stating that ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct." Imbler vs. Pachtman. No case could more cogently illustrate the wisdom of that rule.

It is not hard to understand why the FBI defendants would attempt to twist the rule of Butz so as to provide a pretext under which they could escape the consequences of a jury's consideration of the evidence against them, but their claim is transparently thin, palpably false, and "contrary to the course of decision in this Court from the early days of the Republic," Butz, 438 U.S. at 487. Without question, despite the heavy political influence they so urgently seek to bring to bear between the lines, their wholly groundless petition must be denied.

L. THE CIRCUIT COURT CORRECTLY FOLLOWED THE EXPRESS LEGISLATIVE INTENT AND "BROAD REMEDIAL PURPOSE" OF 42 U.S.C. 1988 IN AWARDING ATTORNEYS' FEES TO PLAINTIFFS ON APPEAL

The federal and state defendants ask this Court to review the Circuit Court's award of attorneys fees for work on the appeal of this case, claiming that the plaintiffs are not "prevailing parties" within the meaning of 42 U.S.C. 1988.* In its order setting the amount of the fee, the Court said:

> At the outset, we note that both the federal and state defendants contend that plaintiffs do not presently enjoy "prevailing party" status and thus are not entitled to attorneys' fees for appellate work. In Hampton II, we were not persuaded by this argument, nor are we convinced of its merits at this time. It is settled law that in order to be a prevailing party one need not win on each issue in the case. A party prevails if judgment is entered in his favor even though he did not sustain his entire claim. 10 Wright & Miller, Federal Practice & Procedure, #2664. The legislative history of the Act makes clear that Congress intended that plaintiffs who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" could be a "prevailing party" under the terms of the Act. Nadeau v. Helgemoe, 581 F.2d 275,278-79 (1st Cir. 1978).
>
> Hampton v. Hanrahan, ___F.2d___(order of 12/12/79 at para. 2; Attached as Appendix J)

The Court then went on to correctly characterize the extent to which the plaintiffs had prevailed on appeal:

> We believe plaintiffs have shown substantial success on the merits on appeal, including the reversal of the directed verdicts, the right to discover the alleged informant's identity, a hearing to determine what sanctions, if any, should be imposed against the federal defendants and their attorneys for suppressing documentary evidence, and consideration of plaintiffs' outstanding discovery demands on remand. Thus, plaintiffs are prevailing parties. We believe that any other construction of the Act would frustrate its basic rationale.
>
> Hampton II (order of 12/12/79 at p. 3)

The Circuit Court grounded its decision in the legislative history of the Act, which expressly establishes that, in their discretion, courts may

*The federal defendants claim the issue is "whether having determined only that directed verdicts should not have been entered in favor of petitioners, and that the case should therefore be remanded for a new trial, the Court of Appeals erred in awarding fees to respondents as "prevailing parties" under 42 U.S.C. 1988?" The state defendants ask "whether under 42 U.S.C. 1988 plaintiffs may be awarded Appellate Attorneys' fees while the question of liability and alleged civil rights violations are still pending in the trial court, there being as a consequence no "prevailing party" as required by 42 U.S.C. 1988? Does the Court of Appeals' ruling in this respect violate petitioners' right of due process under the Fifth Amendment as construed and applied? "(Point XI) And they argue that, "as construed and applied by the Court below 42 U.S.C. 1988 violated defendants' constitutional rights, is contrary to Congress' intent and conflicts with other circuits."

find a civil rights plaintiff to have prevailed before final judgment and award interim fees, in order to serve the broad remedial purposes of 42 U.S.C. 1988. As the House and Senate reports state:

> Furthermore, the word "prevailing" is not intended to require the entry of a final order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." Bradley v. Richmond School Board, 416 U.S. 696,723 (1974); see also, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Such awards--pendente lite--are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidlines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees..." Bradley v. Richmond Board, supra, at 722, n. 28. (H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 8.) (emphasis supplied)
>
> * * * *
>
> In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra,; Mills v. Electric Auto-Lite Co., 396 U.S. 375(1970). (S.Rep. No. 94-1011, 94th Cong. 2d. Sess. 5.) (emphasis supplied)

The Circuit Court's opinion on the merits of the Appeal, and the history of the case itself, clearly demonstrate that this is the very kind of case which was contemplated by the drafters of the Act. It is certainly "protracted litigation," having extended into its eleventh year, and the Court of Appeals' decision is "an important matter in the course of the litigation which has determined substantial rights of the parties." The decision has restored most of the defendants to the case, and guarantees that a jury must decide their fate. It has determined that the defendants obstructed justice, suppressed documents, and used dilatory tactics throughout the entire pretrial and trial of the case, and has ordered a hearing on sanctions for these tactics. The Court provides for full discovery--including the revelation of defendant Groth's purported informant--upon retrial, and directs re-assignment away from the hopelessly biased trial judge.

Several Courts have awarded attorneys fees on appeal although the decision did not finally determine the ultimate liability of the parties. The Ninth Circuit, in awarding attorneys' fees to a defendant who successfully defended

against an interlocutory appeal, held:

> The EEOC argues that 706(k) authorizes an award only to the prevailing party. Although Xerox "prevailed" on this interlocutory appeal, it still might lose the principal case, and thus not prevail. We agree that litigation may not be dissected to the point that the losing party be permitted to recover attorneys' fees connected with every procedural motion in which it prevails. But this interlocutory appeal is sufficiently significant and discrete to be treated as a separate unit . Thus the fact that Xerox prevailed on this appeal qualifies it as "prevailing party eligible for award of attorneys fees connected with the appeal." Xerox v. Van Hoomissen, 503 F.2d 1131 (9th Cir. 1974)*

Further, it is well accepted, contrary to defendants' assertions, that the plaintiff need not establish a violation of federal law or the Constitution before he/she can be determined to be a prevailing party under the act. See e.g. Gagne v. Maher, 594 F.2d 336 (2nd Cir. 1979), cert granted ___U.S.____, Davis v. Pastrick, 600 F.2d 70,78 (th Cir. 1979); Parker v. Matthews, 411 F.Supp. 1059, 1902-3 aff'd sub nom 561 F.2d 320 (D.C. Cir. 1977); Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979); Brown v. Culpepper, 599 F.2d 274,277 (5th Cir. 1977).

The defendants place much reliance upon several circuit cases which refused to find that a successful appellate plaintiff had prevailed within the meaning of the Act. In Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976), the Court, after noting that the legislative history of 42 U.S.C. 2000-5(k) unlike that of Sec.1988, made no mention of interim fees, found that a Title VII plaintiff, who had won reversal of the outright dismissal of her claim on statute of limitations grounds but had lost on the denial of a temporary restraining order, had not prevailed within the meaning of that Act. Similarly, in Bly v. Mcleod, 605 F.2d 134(4th Cir. 1979), a plaintiff who had won remand from the 4th Circuit on the issue of dismissal of his complaint, in order to determine the basis of the District Court's decision,** was refused

*See also Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); plaintiff found to prevail under 42 U.S.C. 2000- (k) for winning a reversal on summary judgment, cited with approval in Johnson v. Georgia Highway, 488 F.2d 714 (5th Cir. 1974), Chandler v. Roudebush, 13 EPD Para. 11,574 (C.D. Cal. 1977). See also, Bagby v. Beal, 606 F. 2d 411 (3rd Cir. 1979),(attorneys' fees awarded to plaintiff for obtaining due process hearing although hearing officer ultimately upheld suspension from job).

**At the trial level the plaintiff had won a temporary restraining order and the empanelling of a three Judge Court.

prevailing party status under 42 U.S.C. 1973(e) and 1988. In these cases, unlike the case at bar, the plaintiffs did not meet the contemplated standards. They were at the beginning of their litigation; the appellate decisions were clearly preliminary and procedural, and did not determine significant rights of the parties. Nor did those cases carry the compelling and longstanding social significance of the case at bar. In those cases the Courts were well within their discretion to deny prevailing party status, just as here, the Court was well within its discretion to find that the plaintiffs had sufficiently prevailed under the Act.

Several additional factors give further support to the Circuit Court's exercise of discretion in awarding fees here. In the present posture of the case, plaintiffs have "prevailed" on numerous significant issues at the trial level. We have survived a motion to dismiss, after taking an appeal to the Seventh Circuit, and successfully reversed the trial Court's entry of a severance order, after filing mandamus to the Seventh Circuit. We have fought for our evidence throughout the pretrial and trial stages, having ultimately obtained much of it despite unremitting "dilatory" and "obstructionist" tactics by the defendants. The content of many of these documents received wide public exposure upon entry into evidence at trial*, and they were instrumental in aiding the Senate Select Committee's findings. Further, the relief on appeal will have a significant effect on the ultimate determination of the issues. In particular, the Court's decisions concerning Groth's informant and the sanctions against the federal defendants may well lead to the conclusion of certain basic issues against the defendants--including the 4th Amendment claims. Further, defendants' pious assertions of "blamelessness" to the contrary notwithstanding, their obstructionism and concealment of evidence violated federal law, and, as the Circuit Court found, its effect was to deprive plaintiffs a fair trial--an actionable Due Process violation in and of itself,

*The "public education function" here served is analogous to that of a plaintiff who is considered a "prevailing party" under the Freedom of Information Act and is thereby entitled to fees. See: Campbell v. U.S. Civil Service Commission, 539 F.2d 58 (10th Cir. 1976); Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Flower v. FBI, 448 F.Supp. 899 (N.D. Tex. 1978).

which fully supports the fee award.*

Moreover, the same obstructionism and misconduct forced plaintiffs to suffer through long, fruitless proceedings in the trial court, and were largely responsible for the massive appeal they were obliged to make to the Seventh Circuit; and the fee award only begins in some small measure to recompensate plaintiffs for that largely needless and redundant effort at a premature stage in the proceedings.

The state defendants also assert that their right of access to the Courts is inhibited by this ruling, and claim that the plaintiffs' attorneys are not acting in the public interest. As the Court's opinion below reflects, the events of and surrounding December 4th have been of great social significance and interest in Chicago as well as nationally, especially to black citizens. The opinion recognizes that major elements of both local and federal governments were either involved in the events themselves or in suppression of the truth after the fact. Those judicial, prosecutorial, and law enforcement officials, charged with enforcing the Constitution, broadly perverted and abdicated their responsibilities; and it has only been because of the efforts of plaintiffs' lawyers--working with only token compensation when there was any at all--that any real effort to bring the whole truth to the public has been accomplished. Also before the Court were public records which show that these same state defendants have had private counsel of their choice since the beginning, lawyers who have been paid over 1.6 million dollars in attorneys' fees, and costs, while the federal government has expended over $500,000 in defense of the four federal defendants since 1974. These funds are limitless. They serve to encourage and underwrite endless obstructionism and likewise insure that any possibility of settlement remains contrary to the financial interests of the defendants' lawyers. Recognizing the meaning of such complete public sponsorship of the defense, the Circuit Court directed that the

*Additionally these findings of violations of the Constitution and Federal Law will hopefully have a deterent effect on these defendants and persuade them to conform their actions to Federal and Constitutional norms on the retrial, a result which independently supports a fee award. See Fogg v. New England Tel. & Tel. Co., 346 F.Supp. 645 (D.N.H., 1972) (fees granted although plaintiff lost because defendant conformed practices to hire more women); Parham v. Southwestern Bell Telephone, 433 F. 2d 421 (8th Cir. 1970); Bolton v. Murray Envelope, 553 F. 2d 881 at 884 (2d Cir. 1977); Mid-Hudson Legal Services v. G & U, Inc., 578 F. 2d 34 (5th Cir. 1978).

fee awards be charged to the defendants in their official capacities, ordering the very modest sum of approximately $73,000 for the undersigned, and some $27,000 for counsel for the remaining plaintiffs.* Hampton II, 12/12/79 order at p. 2 . In this light, the defendants' arguments about inhibited "access to the Courts" are both unbearably arrogant and legally and factually absurd.

It is hard to imagine a more appropriate case for an award of interim fees. As the legislative history clearly states, the Civil Rights Act "depends heavily on private enforcement," and fee awards are an "essential remedy" because the aggrieved plaintiff often has "little or no money." (S. 2278, p.2) Further, the legislative history states:

> The remedy of attorneys' fees has always been recognized as particularly important in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area Congress has instructed the Courts to use the broadest and most effective remedies available to achieve the goals of the civil rights laws. S. 2278, p. 3 See also Hutto v. Finney 437 U.S. 678 (1978).

If the discretion to award interim fees in circumstances like these is denied or curtailed, civil rights plaintiffs in complex cases will surely have little chance for vindication remaining to them. If defendant officials are endlessly sponsored with public funds, and may take advantage of such support to delay and obstruct the proceedings against them until the plaintiffs are exhausted and must give up, Constitutional guarantees will be robbed of meaning; and it would make more sense to repeal the act, and save all that money. Unless the Court is prepared to go to this length, the petitions on this issue must be denied.

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*The undersigned requested compensation for 3650 hours at a rough average of $75 per hour for a total of $288,000, and requested a multiplier. Mr. Montgomery sought an additional $100,000 for approximately 1800 hours at $75.00 per hour. The Court compensated the undersigned for approximately one-half their total hours, at $40 per hour, while compensating Mr. Montgomery at the same rate for approximately one-fourth of the hours he claimed. In contrast the state defendants alone received over $300,000 in fees for over 6800 billed hours of work for losing the appeal; their charges were personally approved by the District Court.

V. CONCLUSION

After ten years, it is as difficult to find fresh words and new energy with which to plead this case as it is demoralizing to face the reality that, with the weight of three governments behind them, and an Establishment very self-servingly dubious about the underlying facts looking on, the defendants have been able to thoroughly frustrate the normal processes of litigation, and effectively nullify the promise of equal justice which is supposedly the foundation of our Law.

It is not difficult to perceive why the defendants and their government patrons would shrink from the prospect that the truth in this case would be brought to a fair hearing, or why the leaders of government over this decade --from one County Board, one Mayor, one Attorney General and one Administration to the next-- would so readily fall in with the continuing conspiracy of cover-up and resistance to judgment. When reasonable, impartial citizens, lawfully constituted as a jury, hear this evidence, and respond in conscience to these facts: these bullet holes and trajectories, this floorplan, these FBI documents; all of this guilty behavior, and these palpable lies --such a verdict must be awesome and frightening to the Establishment, when the evil side of its nature stands so starkly revealed.

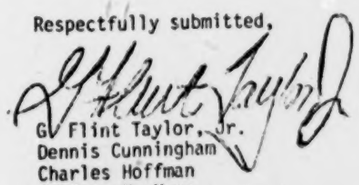
The assassination of Fred Hampton, like the shocking, frightening, and still unredressed constitutional treason of COINTELPRO which brought it about, is a pure embodiment of that which the Bill of Rights was created to guard against. After ten years, the case it gave rise to has become a commensurate perversion of the Administration of Justice. It is not an accident, but a conspiracy of power which has prevented the killers of Fred Hampton and Mark Clark from being brought to account for their acts in a Court of Law. The Bill of Rights was intended as a system of restriction on power, and the Civil Rights Act as a remedy for its abuse. Government, the Courts, the Establishment, have tolerated the abrogation of both in this case for ten years; until the conscience of the Court of Appeals was applied to uphold the validity of the plaintiffs' claims and evidence, and

their right to have them fairly heard.

The instant petitions represent the last best hope of the defendants to succeed with legitimated murder, and with the continuing conspiracy by which they have managed to evade judgment. The claims and issues they have formulated for certiorari are 'transparently thin, palpably false,' and totally beneath the notice of this Court under all the applicable rules. Yet the underlying plea they bring to this Court is momentous: join the conspiracy, suppress the truth, protect the police no matter what they do; and let the Bill of Rights abate.

Such is the real substance of what they demand, and expect, with their claims for immunity and other forms of protection from a fair adjudication of the claims against them. If the true insterests of the Establishment, the Administration of Justice, and the People --as expressed in the Bill of Rights-- are to be upheld, such demands must be firmly rejected, and certiorari must be denied.

Respectfully submitted,



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No. 79-914

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents Anderson, Bell, Clark, Satchel, and Truelock (hereinafter "respondents") contend (Br. in Opp. 85-88) that a number of court of appeals' decisions support the holding of the court below that respondents are entitled to recover interim attorneys' fees as "prevailing parties" within the meaning of 42 U.S.C. 1988.

Of the cases cited, only two from the Ninth Circuit—a 1977 district court decision and a 1972 appellate decision in which fees were awarded without discussion—support respondents' position.[1] However, the Ninth Circuit's

[1] *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779 (9th Cir. 1972); *Chandler* v. *Roudebush*, 13 Empl. Prac. Dec. para. 11,574 (C.D. Cal. 1977). It is unclear whether the fee award in *Malone* was even contested, since the court simply announced that the award would be made pursuant to the fee provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), "[u]nder the particular circumstances of this case" and stated that the amount awarded had been

decision in *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979), makes clear that those cases are no longer good law. In *Chinese for Affirmative Action*, the court of appeals held that plaintiffs were not entitled to a fee award under the attorneys' fees provision of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973*l*(e), because although they had prevailed on the appeal, "[n]o issue on the merits has been finally determined in favor of any party" (580 F. 2d at 1009).[2]

"stipulated to as reasonable by North American's counsel." 457 F. 2d at 781. Respondents' statement (Br. in Opp. 86 n.*) that *Malone* was "cited with approval" in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), is misleading because *Georgia Highway Express* concerned the amount of attorney fees awarded, not whether the plaintiffs were prevailing parties.

Another Ninth Circuit case, *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131 (9th Cir. 1974), on which respondents rely (Br. in Opp. 86), is inapposite, even assuming it is still good law after *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006 (9th Cir. 1978), cert. denied, 439 U.S. 1129 (1979). In that retaliatory firing suit, brought by an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Equal Employment Opportunity Commission sought to file a complaint in intervention that both supported the plaintiff's unlawful discharge claim and would have broadened the suit to include a challenge to the defendant's allegedly discriminatory hiring practices. The district court rejected EEOC's effort to broaden the suit, limiting its intervention to the issue of retaliation. On EEOC's appeal, the Ninth Circuit affirmed the district court and awarded the defendant attorneys' fees connected with the appeal. Although the order affirmed was technically interlocutory, it finally determined the issue of the defendant's liability in that action on the proposed hiring practices allegations. Respondents in the present case—having won merely the right, as plaintiffs, to a new trial on their allegations—are clearly not in the same position as the defendant in *Van Hoomissen*.

[2]As we noted in our petition (Pet. 24), the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, which added the fee provision to 42 U.S.C. 1988, was expressly patterned on, *inter alia*, 42 U.S.C. 1973*l*(e).

In each of the other cases cited by respondents, the fee awards were made because plaintiffs had prevailed by obtaining all or part of the relief sought in their complaints through settlements of varying degrees of formality,[3] through unilateral action of the defendants, induced by the filing of the lawsuit,[4] or through actual court rulings for plaintiffs on the merits of some of their claims.[5]

Respondents' circumstances in the present case in no way resemble those of the parties found to have prevailed in the cases cited above. In their amended complaint respondents seek to recover some $21 million in damages for alleged constitutional violations in connection with the December 4, 1969, search of the Fred Hampton apartment and the related shootings, arrests, prosecutions, and official investigations. Respondents

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[3]*Dawson* v. *Pastrick*, 600 F. 2d 70, 78 (7th Cir. 1979); *Brown* v. *Culpepper*, 559 F. 2d 274, 277 (5th Cir. 1977); *Parker* v. *Matthews*, 411 F. Supp. 1059, 1062-1063 (D. D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977).

[4]*Ross* v. *Horn*, 598 F. 2d 1312, 1322 (3d Cir. 1979); *Fogg* v. *New England Telephone & Telegraph Co.*, 346 F. Supp. 645 (D. N.H. 1972). The First Circuit has since held, however, that it must be shown that the lawsuit, and not some other factor, prompted defendants to grant (in whole or in part) the relief sought in the complaint. *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279-281 (1st Cir. 1978).

[5]*Bagby* v. *Beal*, 606 F. 2d 411 (3d Cir. 1979) (plaintiff prevailed in district court on claims of entitlement to an administrative hearing and expungement of derogatory information from publicly available personnel record); *Nadeau* v. *Helgemoe*, *supra*, 581 F. 2d 279 (access to library facilities); *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881 (5th Cir. 1977) (class discrimination claims); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970) (class discrimination claims). See also *Gagne* v. *Maher*, 594 F. 2d 336 (2d Cir. 1979), cert. granted, No. 78-1888 (Oct. 1, 1979); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34 (2d Cir. 1978).

have not yet proven any of these claims, much less received damages or injunctive relief. To support their "prevailing parties" conclusion, however, respondents (Br. in Opp. 85, 87) and the court of appeals (order of December 12, 1979, slip op. 3),[6] assert that respondents

[6]In a supplemental opinion issued on December 12, 1979 (as amended December 21, 1979), fixing the amount of the fee award, the court of appeals reiterated its conclusion that respondents are "prevailing parties" within the meaning of 42 U.S.C. 1988 and sought to explain its decision on this question in the passage set out in respondents' brief in opposition (Br. in Opp. 84).

In addition, the court of appeals held (slip op. 13) that the fee award for work on the appeal, which totalled approximately $100,000 (slip op. 2), should be apportioned among the defendants, with one-third to be paid by the federal defendants (petitioners herein) and two-thirds by the state defendants. Perhaps realizing the harshness of its imposition of a fee award at this stage of the litigation, the court made the following observations on the source of payment (slip op. 13; footnote omitted):

> Defendants argue that any fee award would have to be collected from them in their official capacity, rather than in their personal capacities, in the absence of a finding of bad faith. We agree with defendants' position. It is supported by both the decision of the Supreme Court in *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978) and the legislative intent of 42 U.S.C. § 1988. But see *McNamara* v. *Moody*, No. 77-2466, slip op. at 1199-1201 (5th Cir. Nov. 15, 1979). The defendants in this case were sued in their official capacities and have been represented by government attorneys.

Because the federal defendants had not argued that the fees "would have to be collected from them in their official capacity," it is not clear that the court's remarks were meant to apply to them. Nevertheless, the United States, represented by Department of Justice attorneys other than those representing petitioners, has intervened in the court of appeals and filed a petition for rehearing en banc, contending that sovereign immunity bars an attorneys' fee award against the United States, which was not a party to the case. Because the United States sought en banc consideration of its petition, and because an order issued by the court of appeals on September 17, 1979, had stated that the panel would rule on defendants' objections to plaintiffs' specific fee claims without prejudice to defendants' right

succeeded on appeal in winning the right to have their claims retried before a jury, to learn the identity of an informant (a matter related to proof of one of their Fourth Amendment claims but not in itself a claim for relief), to seek additional discovery, and to obtain a hearing before the district court on their contention that the response of petitioners (the federal defendants) and their trial counsel to certain discovery orders warrants imposition of sanctions under Fed. R. Civ. P. 37(b)(2).[7] These rulings do not pass on the merits of respondents' complaint and do not even concern matters of substance, unless the trial process is to be viewed as an end in itself. By this logic, respondents have "prevailed" by compelling petitioners to answer the complaint, to produce thousands of documents in response to discovery requests, and to participate in a trial that continued for 16 months before petitioners' directed verdict motions were granted.

to seek rehearing en banc of the panel's determination, all the defendants below recently filed petitions for rehearing en banc on the "prevailing party" issue. We will advise the Court immediately if the court of appeals takes any action mooting the attorneys' fee issue in the present petition.

[7]Contrary to respondents' assertion (Br. in Opp. 33), petitioners vigorously deny that their responses and those of their trial counsel to discovery requests and orders of the district court were improper or that they warrant the imposition of Rule 37 sanctions. Moreover, the court of appeals has not held that sanctions must be imposed. Judge Swygert would have ordered the district court to impose sanctions (Pet. App. 101a), but Chief Judge Fairchild was willing to join him only in "directing the district court to give consideration to doing so, on remand" (Pet. App. 121a). Judge Pell saw "no necessity for the imposition of sanctions" but joined Chief Judge Fairchild's suggestion "because the case is going back [to the district court] and so that the mandate of this court is clear * * *" (Pet. App. 139a-140a).

Despite all of respondents' baseless assertions and citations, it remains clear that the holding of the court below is contrary to the rule of several other circuits that have addressed the "prevailing party" issue in similar circumstances. Indeed, just prior to the filing of our petition, the Sixth Circuit joined the other courts of appeals that have rejected the Seventh Circuit's approach. In *Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F. 2d 1282 (6th Cir. 1979),[8] the court held that a plaintiff who had succeeded on appeal in having his civil rights claims remanded for a jury trial was not a prevailing party under 42 U.S.C. 1988 and thus was not entitled to an award of attorneys' fees. As the court explained (607 F. 2d at 1283):

> We think that this request [for attorneys' fees] is premature. The plaintiff has indeed prevailed on this appeal, but he has yet to establish that his rights were violated. Until he does, we do not think that the defendants should have to pay his attorney's fees. Otherwise, innocent defendants could end up paying for losing plaintiffs' procedural victories.
>
> We are aware that Congress has authorized the award of attorney's fees *pendente lite* or upon a partial vindication of one's civil rights. *See* Sen. Rep. No. 94-1011 (1976), reprinted at 1976 U.S. Code Congressional & Administrative News pp. 5908, 5912. Here, however, the plaintiff's successful appeal had nothing to do with the merits of his claim.

[8]Although the decision will ultimately appear at the volume and page cited, it is currently reported in the appendix to the paper-bound volume of Federal Reporter 2d for Feb. 18, 1980 (Vol. 8), containing cases to appear in 610 F. 2d and 611 F. 2d.

Finally, respondents contend (Br. in Opp. 87) that the fee award is supported by the "social significance" of their case and the "wide public exposure" of certain documents they received in response to discovery requests. These contentions are without merit. The traditional American rule requires each party to pay its own attorneys' fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Congress varied that rule in the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, but only for those litigants who qualify as "prevailing parties" within the meaning of 42 U.S.C. 1988. Hence, respondents are entitled to a fee award only after they have achieved that status, regardless of how much publicity their litigation generates or how significant it might be in other respects.[9]

2. Respondents charge (Br. in Opp. 75) that our petition "misappl[ies] the rule of *Butz*; compounding the offense by borrowing from the District Court's outlandish 'summary' and otherwise substantially misrepresenting the evidence adduced at trial." They therefore ignore the fact that our basic statement of the evidence (Pet. 10-16) is simply a summary of the evidence that, according to Judge Swygert, the author of the majority opinion for the

[9]Respondents also contend (Br. in Opp. 87 n.*) that "[t]he 'public education function' " they assert is "served" by this litigation "is analogous to that of a plaintiff who is considered a 'prevailing party' under the Freedom of Information Act," 5 U.S.C. 552(a)(4)(E). As the cases cited by respondents make clear, however, the question of the public interest served by a suit under FOIA is separate from the question whether the plaintiff has "substantially prevailed." Attorneys' fees are not automatically awarded in FOIA suits to those who "substantially prevail." The fact that a FOIA suit has served a "public education function" might be justification for awarding fees to a substantially prevailing party, but it is not a ground for awarding them to one who has not prevailed on at least some of his substantive claims. In any event, respondents' right to attorneys' fees is governed by 42 U.S.C. 1988, not FOIA or any other statute.

court of appeals, "provide[s] the basis for a determination of the legal issues concerning the directed verdicts" (Pet. App. 44a). We do not, in fact, agree with Judge Swygert's characterization of much of the evidence. For the reasons set forth in our petition (Pet. 27-32), however, we submit that even if that summary of the critical evidence is accepted as correct, the court of appeals erred under *Butz* v. *Economou*, 438 U.S. 478 (1978), when it reversed the verdicts directed in favor of petitioners.

Respondents rely heavily (Br. in Opp. 5-6, 12-17, 33, 77) on evidence concerning the FBI's counterintelligence program, known as COINTELPRO, consisting of covert actions aimed at various domestic political organizations. But as Chief Judge Fairchild pointed out in his concurring opinion (Pet. App. 120a), the existence of a program to "discredit and hamper [the Black Panther Party] in its political activity" does not prove that petitioners conspired with the state defendants to commit the specific constitutional violations on which the complaint in this case ultimately depends, *i.e.*, to conduct a raid, based on a warrant unsupported by probable cause, with the intent to use deadly force against Black Panther leaders and thereafter to harass the survivors with a malicious prosecution. Nor was the limited authority vested in FBI field offices under the COINTEL program[10] needed to permit petitioners to carry out the tasks of investigating black nationalist groups suspected of engaging in federal criminal activities, using informants in aid of such investigations, and reporting activities that appeared to violate state and local laws to the appropriate state and local law enforcement agencies. A directive

[10]FBI field offices were not permitted to initiate any action under COINTELPRO *"without specific prior Bureau authorization"* (Pl. Exh. 1, page 3 (emphasis in original)).

issued February 2, 1968, from FBI headquarters (Fed. Def. Exh. 10), which implemented a September 14, 1967, memorandum from Attorney General Ramsey Clark to the Director of the FBI regarding criminal offenses "occurring in the course of recent riots" and the possible existence of conspiracies to foment further riots (Fed. Def. Exh. 9, page 1), reminded the field offices to bring any violation of local laws "to the attention of the local police" (Fed. Def. Exh. 10, page 1).[11]

In sum, the FBI's investigation of the Chicago chapter of the Black Panther Party—in particular the Party's stockpiling of firearms—and its sharing of the information gained in the investigation with local law enforcement agencies was conduct responsive to existing law enforcement directives. As we have argued in our petition (Pet. 30-31), the evidence relied on by the court of appeals as creating a jury question whether petitioners went beyond this lawful activity and conspired to commit an illegal entry of the Hampton apartment, to kill occupants of the apartment, and to undertake malicious prosecutions of the survivors, amounts to nothing more than sheer conjecture. Because, as Judge Pell observed in dissent, respondents failed to produce any "hard basic reasonable inference-creating facts" (Pet. App. 153a), the trial judge properly directed a verdict for petitioners. In light of this Court's admonition in *Butz* v. *Economou*, *supra*, the trial judge's order was correct. See also

[11]Both the Attorney General's memorandum and the FBI Director's memorandum listed specific federal criminal statutes relevant to the proposed investigations of black nationalist groups suspected of illegal activity (Fed. Def. Exh. 9, pages 1-2; Fed. Def. Exh. 10, pages 2-3). The Attorney General's memorandum also directed the FBI "to determine the whereabouts of persons who might be involved in instigating riot activity in violation of federal law" (Fed. Def. Exh. 9, page 3).

Pennsylvania R.R. v. *Chamberlain*, 288 U.S. 333, 338-343 (1933). The evidence offered by respondents was simply insufficient to warrant subjecting federal officials such as petitioners to the burden of another trial.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

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